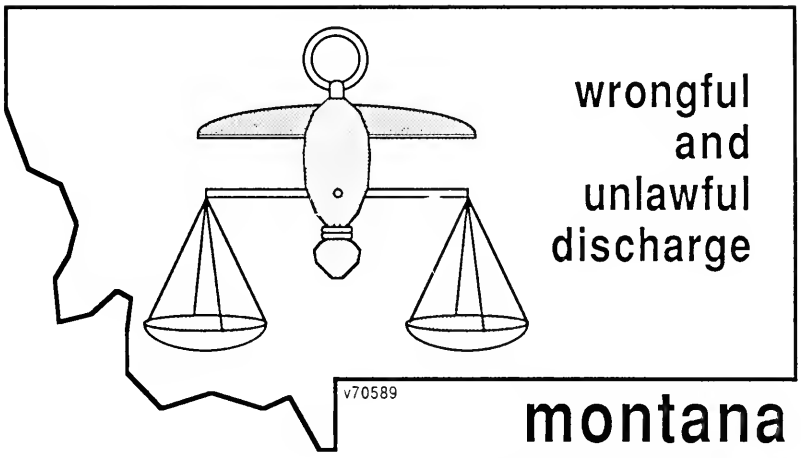

wrongful and unlawful discharge

montana cases and considerations

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publication date: july 5, 1989

Professional Development Center

Montana has seen a number of cases dealing with wrongful and unlawful discharge. In the mid-1980's, the state gained a reputation for judicial decisions that greatly favored employees in cases against their former employers. "Liberal" consideration of tort law and high awards to plaintiffs, along with the general move toward tort reform, led to the passage of the Wrongful Discharge from Employment Act in 1987.

This summary traces, in chronological order, the development of case law in the area of discharge from employment. Only Montana Supreme Court cases are presented here (with the exception of a few Federal District Court decisions); Montana district court cases that have not been appealed follow the Supreme Court precedents. On June 29, 1989, the Supreme Court upheld the Wrongful Discharge from Employment Act; thus many of the tort precedents described here no longer apply to the employment relationship. However, stay aware of further court decisions.

EARLY DECISIONS — prior to Gates

Weir v. Ryan (1923)

A married ranchhand had been hired at a rate of $75 a month. In offering the job by letter, the rancher had stated, "I think I can use you year-round." Six months later, the ranchhand was fired. In a lawsuit, the rancher claimed the employee did inferior work and knew little about irrigation. The ranchhand referred to the letter, saying that the phrase "year-round" established a contract for one year. The court agreed: the letter was an oral contract obligating the rancher to employ the hand for one year. The court held that, since the rancher had not shown that the employee's performance was, in fact, inferior, there was no cause for the discharge, so the contract was still in effect.

State ex rel. Nagle v. Sullivan, et al. (1935)

Upon resignation of the governor, the lieutenant governor assumed office and soon dismissed the Fish & Game Commission so he could appoint his own choices. One member sued, claiming the governor could not remove him except for cause. The governor cited the statute which said a governor could remove a commission "for cause or for the good of the commission." The governor asserted that it was for the good of the commission for him to appoint his own choices. The court disagreed, saying that the statutory phrase had to be taken as a whole, meaning a commissioner could be removed only for cause.

State ex rel. Opheim v. Fish and Game Commission (1958)

A Fish & Game biologist was summoned to a commission meeting, ostensibly to discuss one of the biologist's coworkers. Instead, the biologist himself was discharged by the commission without notice or hearing. After the biologist protested, a hearing was held some time later, and the commission upheld the discharge. The court held that the biologist's due process rights were violated; by statute, the hearing should have been held prior to the discharge. The court ordered the biologist reinstated and awarded costs of litigation.

State ex rel. Ford v. Fish and Game Commission (1966)

A game warden, hunting along the Montana-Idaho border, had taken a bighorn sheep. He had a Montana sheep permit, but Idaho charged he had taken the sheep in Idaho. The department director went to the commission, seeking direction on how to handle the controversy. The commission suggested the director get the warden to resign, and if that failed, to fire him. The director fired the warden after he refused to resign. After the discharge, the warden received a hearing before the commission, which upheld the discharge.

At issue in the subsequent lawsuit was, who did the firing? One statute governed the director, stating that he could discharge an employee, and then grant a hearing if one were demanded. Another statute governed the commission, stating that it could discharge an employee only after a hearing had been held. The court ruled that, since the director was acting at the behest of the commission, the commission had in fact fired the warden. The post facto hearing was thus a violation of due process under the second statute, and the warden was reinstated.

Weber v. Highway Commission of State of Montana (1971, federal)

The plaintiff worked as a draftsman for the Highway Department for two-and-a-half years. His performance had been criticized, but his performance appraisals contained satisfactory ratings. He wrote a letter to the editor of the local newspaper; the letter was highly critical of the governor. Soon afterward, the department fired him, claiming that he had overstated his qualifications on his application form and had failed to divulge arrests he had had as a juvenile. The department did not grant a hearing on the discharge.

In the lawsuit, the federal district judge held that the commission had violated Weber's due process rights, since he was entitled to the job. The entitlement was not granted by virtue of initial employment or by state law. Rather, the department's regulations, which stipulated that discharge could only be for cause and after a hearing, created the entitlement. The judge described that entitlement in his opinion:

property right: "Where . . . the employment is under circumstances that give the employee an expectancy of continued employment, then the employee has a right or entitlement which cannot be divested without hearing. This is so not only as a matter of state law but as a matter of due process under the 14th Amendment."

However, the judge held that the department had not infringed on Weber's right of free speech:

free speech: "The fact that the motive for the firing was generated by plaintiff's exercise of his first amendment rights does not . . . prevent the Highway Department from dismissing him if a valid cause for the dismissal is shown. . . . I think that the first amendment does not go far enough [that it will] protect a person who turns a spotlight on himself from the consequences of what is disclosed in the glare of that light." However, in a 1972 decision (*Perry v. Sindermann*), the U.S. Supreme Court held that a valuable government benefit (such as a job) may not be denied on a basis that infringes on one's constitutionally protected interests, especially one's interest in freedom of speech.

Ameline v. Pack & Co. (1971)

This case involved an alleged agreement for William Ameline to be employed by Pack and Co. for a period of one year at a monthly salary. Ameline's employment as a paver-operator was terminated after seven months. The company said there was no more work and it could not afford to carry a crew through the winter. Ameline sued to recover the balance of the year's salary, plus damages for moving expenses and wrongful termination. The trial court found in his favor, awarding about $3900, plus interest, court costs, and attorney fees.

On appeal, the company said the employment "contract" was month-to-month, not for the year. In addition, it stated that the discharge was for a "good cause,"introducing evidence of drinking, hangovers, and other matters. The Supreme Court found that there was credible evidence pointing to a contract for one year. And although there was evidence to support the good cause for termination, there was also conflicting evidence in the testimony of Ameline's supervisor, who stated Ameline did good work. The Court also noted that the "good cause" defense by Pack "was not made an issue except as an afterthought." In affirming the award to Ameline, the Court said, "The defendent [Pack] had the burden of proof to establish the cause for discharge, if any there was, and simply failed to do so."

Storch v. Board of Directors (1976)

Storch was a newly hired counselor at a mental health center. As such, he was a probationary employee. A member of the board of the directors of the center felt that Storch's dress, hygiene, and cohabitation with his girlfriend were unbefitting a counselor. The member wrote a letter to the director, urging him to fire Storch. The director tried to get Storch to resign and, failing that, discharged him. Storch filed suit, claiming defamation of character and invasion of privacy. District Court granted summary judgment for the board. The Supreme Court affirmed the judgment. Of importance is the court's statement about probationary status:

probationary employee: "Finally, the facts stipulate that plaintiff was on probationary status. The purpose of such status is to provide a brief period in which to measure the employee's ability to perform the job before granting him a degree of job security. If the appropriate state employer feels that the employee is not measuring up during this probationary period, it can dismiss the employee without procedural due process."

This interpretation remains in effect to date.

Swanson v. St. John's Lutheran Hospital (1979)

Swanson was a nurse-anesthetist at the hospital. She had been scheduled to assist in a sterilization procedure — a tubal ligation — something she had done 20 times before. However, this time she refused. A "conscience statute" in Montana allows medical personnel to refuse to participate in abortions and sterilizations. Upon Swanson's refusal, the hospital fired her, giving her a "service letter" that stated she was discharged because of her refusal.

District Court upheld the firing, finding Swanson to be an employee "of questionable value" on other aspects of performance the hospital had brought up duringthe suit. The Supreme Court reversed. It said the conscience statute created public policy allowing such refusal to participate, and no reading of the statute could rule out such refusal even if the person had previously participated. Thus, Swanson could assert her right at any time. The court also said the district court had erred in considering other issues of performance; since the discharge letter had dealt only with Swanson's refusal, no other issues could be brought into the lawsuit.

Keneally v. Orgain (1980)

The plaintiff worked for National Cash Register Company, starting as a salesman and eventually becoming account manager for a large region of the state. He frequently complained, verbally and in writing, to upper management about the company's poor service and maintenance of its products. Eventually, he was fired. He filed suit, stating a public policy claim that his discharge had been retaliation for his complaints. He also said the company was refusing to pay him commissions he had earned on sales prior to his discharge. The company responded that it fired Keneally for poor sales performance in his area. Further, NCR cited its policy to pay commissions on sales only upon installation. While Keneally had written some sales, he was fired before installation and thus would not receive the disputed commissions.

The Supreme Court upheld the discharge, stating that no public policy had been violated. That is, since the business practices of the company posed no peril to the public or misuse of public funds, such practices were the company's own business, and Keneally was not protected by the public policy exception to at-will status. Of importance, though, is that the court cited *Monge v. Beebe Rubber Co.* (New Hampshire, 1974) and stated: "We do not disagree at this juncture that in a proper case a cause for wrongful discharge could be made out by an employee." The court was thus willing to consider such a case, but found that this case did not meet the test of public policy violation. Regarding Keneally's commissions, the court held that, since the discharge was proper, Keneally was not entitled to any commissions except those on installations in the two-week period between the notice of termination and its effective date.

Reiter v. Yellowstone County (1981)

Reiter worked 18 years for the county, advancing to the position of night supervisor/custodian. One night, he fired one of the staff janitors. Reiter, in turn, was fired. The county administration then began to reconsider its action. At an informal meeting with Reiter, the termination was revoked and he was placed on suspension, pending a hearing. The county commission repeatedly delayed holding a hearing, but continued to promise one "soon." Eventually, the commission decided against a hearing and fired Reiter, sending him a letter stating the reasons — reasons that Reiter disputed.

Reiter filed suit against the county. He claimed that his 18 years of service entitled him to a due process hearing before he could be terminated. He also said the commission acted in bad faith by repeatedly promising a hearing but then reneging.

The Supreme Court upheld the discharge, saying that Reiter was an at-will employee under Montana law. The court said no independent source could be found that established an entitlement to the job, so the at-will statute applied. The court's opinion discussed current challenges to the at-will rule, but said, "While the rule may well be outdated, it is uniquely the province of the legislature to change it." Thus, Reiter had no claim to due process. The court rejected Reiter's claim that his length of service implied a contract and that such a contract implied a covenant of good faith and fair dealing. Without a "contract," there could be no "covenant." According to the court, even if there were a covenant, the commission did not act in bad faith since, under the law, it did not owe Reiter due process. Although the commission had promised a hearing, it was not an enforceable promise.

Staudohar v. Anaconda Co. (1981, federal)

This case, in federal court, dealt with a 35-year employee of the Anaconda Company. He had been a

foreman for almost three years, and thus was not a member of the collective bargaining unit. Staudohar was fired for possession of company gasoline. He did not receive a hearing. The court upheld the discharge, saying there is no public policy violation when the discharge is for cause. The court rejected the employee's claim that he had an entitlement to the job and thus was owed due process:

property right: " . . . it is the plaintiff's theory that after a lengthy period of employment an employee gains some kind of entitlement to a job which cannot be terminated for something less than good cause."

This is the same judge who had said, 10 years earlier in Weber : "Where . . . the employment is under circumstances that give the employee an expectancy of continued employment, then the employee has a right or entitlement which cannot be divested without hearing. This is so not only as a matter of state law but as a matter of due process under the 14th Amendment."

At issue is whether there was any independent source that supported an entitlement. In Weber, the judge said the Highway Department's rules supported an entitlement. In the Anaconda company, the collective bargaining agreement might have supported an entitlement. But Staudohar did not fall under the union contract, so he could not claim any entitlement. And as a private sector employee, he was not protected by any statute or administrative rule. Thus he was an at-will employee.

RECENT DECISIONS — Gates and beyond

Gates v. Life of Montana Insurance Co. (1982, "Gates I")

Marlene Gates worked as a general receptionist and secretary for the insurance company. She had been employed about three-and-a-half years. One day, the manager informed her that her work and attendance were unsatisfactory, and he gave her the option of resigning or being fired. She resigned. That evening, Gates had second thoughts about her action and called the manager, asking to rescind her decision. The manager agreed, saying he would return her letter of resignation. He didn't.

Gates filed suit. She introduced into evidence the company handbook. Among other issues, the handbook laid out possible reasons for discharge and stated that employees would be given notice of problems before any action would be taken. This, Gates said, established a contract for employment that was in effect until she was informed of problems and failed to correct them. She also claimed she had been pressured into resigning and sought damages for intentional infliction of emotional distress.

The company responded that Gates had resigned, so it was not liable for discharging her. In any case, she was an at-will employee and could be fired at any time. The handbook, said the company, was intended as general information, not a promise to which the company was bound. This was especially true since the handbook had been issued two years after Gates began her employment. District Court granted summary judgement to the company, and Gates appealed to the Supreme Court.

The Court rejected Gates's claim that the company had breached her employment contract:

> "The employee handbook was not a part of Gates' employment contract at the time she was hired, nor could it have been a modification to her contract because there was no new and independent consideration for its terms. An employee handbook distributed after the employee is hired does not become part of that employee's contract. Therefore the handbook requirement of notice prior to termination is not enforceable as a contract right."

However, the court did recognize that there was an employment contract, even though it was an at-will situation.

> "Gates next contends that her employer owed her a duty to act in good faith with respect to her discharge. The doctrine of implied covenant of good faith in employment contracts has been neither adopted nor rejected by this Court, although it was discussed in *Reiter v. Yellowstone County* . . . In *Reiter* we did not reach or decide the issue presented here.
>
> "The circumstances of this case are that the employee entered into an employment contract

terminable at the will of either party at any time. The employer later promulgated a handbook of personnel policies establishing certain procedures with regard to terminations. The employer need not have done so, but presumably sought to secure an orderly, cooperative, and loyal work force by establishing uniform policies. The employee, having faith that she would be treated fairly, then developed the peace of mindassociated with job security. If the employer has failed to follow its own policies, the peace of mind of its employees is shattered and an injustice is done."

". . . a covenant of good faith and fair dealing was implied in the employment contract."

With this conclusion, the court adopted for the first time the implied covenant in employment situations. However, it rejected a tort of wrongful discharge, because there was no public policy violation. In reversing the district court's summary judgment, the Supreme Court sent the case back for trial on the facts. It would be up to a jury to decide if the company had breached the covenant of good faith and fair dealing.

Nye v. Department of Livestock (1982)

Margaret Nye began her employment as a permit clerk with the Department of Livestock. She performed well on the job, passing her probation and achieving permanent status. After a year and a-half, she was promoted to general office clerk and placed on a six-month probationary period in the new job. Within four months, Nye was informed that her performance was inadequate. She was given a 10-day warning notice telling her that the deficiencies had to be corrected. At the end of the 10 days, Nye's supervisor determined her work was still deficient and fired her.

Nye filed a grievance within the department. The grievance committee conducted a hearing and determined that she had received inadequate training and supervision, and had not been treated in "total fairness." The committee recommended that Nye be promised a job on the level of either of the two she had held within the department. After reviewing the committee's recommendations, the department director decided to sustain Nye's discharge. Nye filed suit, seeking judicial review of the director's decision and asking damages for wrongful discharge. District Court granted summary judgement to the department, and Nye appealed to the Supreme Court.

The Court rejected Nye's claim for judicial review, saying hers was not a contested case, since a hearing was not required by statute. However, the court ruled that Nye could assert a claim that she had been wrongfully discharged: "Administrative rules may be the source of a public policy which would support a claim of wrongful discharge." "We find that the Department of Livestock failed to apply its own regulations to Margaret Nye, and thereby violated public policy."

The Court said that Nye had been properly terminated from her new position. "However, the same procedures were not applied to the permit clerk position in which Nye had achieved permanent status. . . . Before the Department could remove Nye from the permit clear position [the old job] in which she had permanent status, the Department had the obligation to follow the public policy expressed in its own regulations.

"There was no showing of 'just cause' for removing Nye from her permanent status in the permit clerk position. She was entitled to proper termination from her permanent position." In this case, the Court recognized the tort of wrongful discharge in Montan, based on a violation of public policy.

Leyland v. Heywood (1982)

Leyland was a nontenured professor at Eastern Montana College. He applied for tenure, and it was denied. The college then offered him a terminal contract, meaning he could teach for one more year. He requested a hearing and statement of reasons why he had been denied tenure. He also requested an extension of the deadline to sign the terminal contract until the tenure issue was settled. The college denied a deadline extension, denied the hearing, and since Leyland did not sign the terminal contract before the deadline, he had no job.

Leyland sued, claiming he was entitled to the hearing. To support his case, he cited comments the college president had made to a faculty meeting. The president had said he supported the faculty and hoped that everyone felt secure in their employment at EMC. Leyland claimed these comments supplemented his employment contract, giving him the expectation of continued employment.

The court ruled that, as a nontenured teacher, Leyland had no vested right to the job, and therefore was not entitled to a hearing. The court also said that the "general comments" of the president did

not supplement the employment contract. In the court's view, Leyland was "simply a nontenured teacher who was not retained."

Lovell v. Wolf (1982)

Helen Lovell had been elected to three 4-year terms as clerk and recorder of Deer Lodge County. Her last term was to expire in January, 1979, but in May, 1977, a city-county charter was put into place. In the reorganization, the County Commission changed the clerk and recorder position from an elected to an appointed office. Joseph Wolf was appointed manager of Anaconda-Deer Lodge County in July, 1977. Six months later, he told Lovell that she was to help another woman in the clerk and recorder's office. Although there was some confusion at the time, Wolf apparently appointed the woman as clerk and recorder, demoting Lovell to assistant.

In mid-February and mid-March, Wolf spoke with Lovell, "suggesting" she retire. When Lovell resisted, Wolf told her the work was unsatisfactory and that she was fired as of March 17, 1978. Lovell filed suit, seeking reinstatement to her position and backpay on the grounds that she had been improperly discharged. The District Court denied her petition.

On appeal, the Supreme Court recognized "due process is the pivotal issue presented in this appeal." At the time of the changeover to a county charter, the County Commission had directed the adoption of a personnel system; this had not taken place within the specified time. The Court found that "[f]rom the city-county manager's first transfer of [Lovell's] duties to the final termination of her employment, [her] rights under the charter were neither recognized or protected." As elected clerk and recorder, Lovell had been general supervisor, not performing any of the specific jobs that required specific skills. Following her transfer to records clerk, she was called on to do technical jobs for which she had no expertise. Before terminating Lovell's employment, Wolf criticized the quality of her work. "However, the record is also clear that Wolf did not call this to her attention until the day he notified her that she was no longer employed, nor was any effort made to train her for the skills necessary to stay on the job."

The Court referred to the *Reiter* case (above) to point out that "to claim due process protection, an employee must be able to point to an independent source" that shows a property interest in the job. In this case, the Court said, there were three, primary among them the county charter. The Court reversed the District Court judgement and sent the case back, instructing that Lovell be reinstated to her position as clerk and recorder, be given backpay from the date of termination (a five-year span), and that hearings be held to determine her future status as an employee.

Como v. Rhines (1982)

This was a contract case arising in Missoula. Gary Como was an accountant living in St. Paul and seeking work in western Montana. In April, 1978, he traveled to Missoula and met with Jim Rhines, president of Sound West, Inc. After two interviews, Rhines and Como had agreed on compensation, benefits, and duties of the job. Payment of moving expenses was included in the agreement.

In early June, Como and his family moved to Missoula. On June 9, 1978, Como went to Sound West and told Rhines he still needed to work out housing arrangements. Rhines told him to do what was necessary and report to work later in the month. Around June 21, Como asked for a starting date. Sound West sidestepped the issue. When Como submitted a list of moving expenses, Rhines refused to pay them. Finally, around the end of June, Rhines told Como there wasn't a job for him.

Como's lawsuit was successful: District Court found that a contract had been struck and that Rhines and Sound West had breached it. The Supreme Court agreed, but found some errors in the determination of damages to be paid to Como. The Court remanded with instructions on determining damages. Sound West had also appealed the fact that Jim Rhines had been found personally liable for the breach of contract. The Court found that the "rule of agency" generally protects corporate agents from liability, but that Rhines had not identified himself as an" agent" of Sound West sufficiently to enjoy the immunity. Thus, he was held personally liable.

Small v. McRae (1982)

This is an interesting case involving the removal of Aaron Small from the chairmanship of the English Department at Eastern Montana College. Robert McRae, as Dean of the school of liberal arts, terminated Small's chairmanship and notified him and other departments by memorandum. The memo spelled out reasons the action was being taken. By the time the dust had settled, Small had

filed a five-count claim against McRae, essentially boiling down to two allegations: 1) Small had been deprived of due process in the removal from the chair, and 2) McRae had libeled Small with the memo. District Court granted summary judgement to McRae, and Small appealed.

The Supreme Court affirmed the summary judgement. The conclusions are briefly stated here; the path to those conclusions is a winding one, tracing constitutional law and judicial precedent. On the due process issue, the Court noted that Small belonged to a collective bargaining unit, and the collective bargaining agreement contained a grievance and arbitration procedure. Small had not used that procedure, electing instead to sue McRae. The Court, however, held that the grievance procedure would have provided adequate due process protection, had Small chosen to grieve. Since he did not, he could not claim deprivation of due process.

On the issue of libel, the Court relied on the *Storch* case (above) in holding that, under statute, the memorandum was an absolutely privileged communication conducted in the official discharge of McRae's duties as Dean. Under this privilege, by definition, there could be no libel.

Gates v. Life of Montana Insurance Company (1983, "Gates II")

After the Gates case was sent back for trial, the jury found in her favor and awarded her $1891 in compensatory damages and $50,000 in punitive damages. The district court judge entered a judgment n.o.v. (notwithstanding the verdict), saying that punitive damages could not be awarded. On this issue, Gates appealed again to the Supreme Court.

The Supreme Court referred to the statute stating when punitive damages could be awarded in cases of fraud, oppression, or malice (27-1-221, MCA) and established a relationship with the covenant of good faith and fair dealing: "Breach of the duty to deal fairly and in good faith in the employment relationship is a tort for which punitive damages can be recovered . . ." The court found that the jury had reason to find that such fraud, oppression, or malice had occurred. Thus the court, by a four-to-three majority, ordered the punitive damages restored.

Owens v. Parker Drilling Co. (1984)

William Owens went to work for as a roughneck for an oil drilling company. However, four days later, he was fired. Owens had lost an arm in a childhood accident. The company told him that, as a matter of safety, they simply could not employ a one-armed man. Owens pleaded for a chance, pointing to past experience in the same line of work and stating his performance had been satisfactory — even commendable. Sorry, the company said, rules are rules. Sorry, Owens said, I'll see you in court.

In his lawsuit, Owens charged that the company had discriminated against him on the basis of his handicap, violating state law. He further sought punitive damages, saying the company had recklessly disregarded his claims of competence and refused to test his ability. The company responded that its policies explicitly forbade employing workers who were missing an eye, an arm, a leg, a foot, or had other such handicaps that posed a reasonable danger to the worker himself or other employees. Citing the hazardous nature of oil-drilling work, the company claimed it had established a bona fide occupational qualification that excluded Owens from the job. District Court granted partial summary judgment to the employer, ruling out any punitive damages. On appeal to the Supreme Court, Owens argued that the discrimination against him was bad enough to warrant punitive damages. The court disagreed: "The mere fact that the conduct on which the lawsuit is based is unlawful should not in and of itself authorize a recover (sic) of punitive damages." The plaintiff must also prove some malice or recklessness on the part of the employer. The court did say, though, that malice could sometimes be presumed from violation of a statute. In considering the issue, the court found:

> "Much confusion has been generated by inconsistent use of loosely defined terms such as willfulness, wantonness, recklessness, gross negligence, and unjustifiable conduct. To avoid future confusion it is necessary to adopt a carefully defined standard of conduct and prescribe its legal significance. We adopt this standard for presumed malice:
>
> "When a person knows or has reason to know of facts which create a high degree of risk of harm to the substantial interests of another and either deliberately proceeds to act in conscious disregard of or indifference to that risk, or recklessly proceeds in unreasonable disregard of or indifference to that risk, his conduct meets the standard of willful, wanton, and/or reckless to which the law of this State will allow imposition of punitive damages on the basis of presumed malice."

The court then looked at the Human Rights Act (Title 49, MCA) and found that "[v]iolation of this statute warrants a claim for punitive damages if such violation is shown to be intentional or reckless." Given the facts that Owens could do the job safely, had done it before, that Parker Drilling made no investigation into Owens's ability and gave no specific facts to show that Owens would be unsafe, the court said a case could be made that the company was reckless. It was a question to be decided by a jury.

On the matter of whether a jury should judge whether the company was reckless, the court showed a vigorous defense of that role: "There are those who distrust the lay person's capacity for reasoned and dispassionate judgement. There are those who tolerate the juries but feel compelled to hold tight rein lest the wretched twelve break the bank. This judicial chauvinism will, if not checked, inevitably erode the jury process."

Bridger Education Association v. Board of Trustees (1984)

The Board of Trustees had not renewed the contract of a nontenured teacher. The teacher asked for a statement of reasons and was told "we think we can find a better teacher." The Supreme Court found this statement to be insufficient under the law (§20-4-206, MCA) that requires a school board to provide, on demand, a statement of reasons for nonrenewal. The court interpreted the law to mean specific, objective reasons regarding performance or conduct.

A similar statute (§39-2-802, MCA) exists for all employers. Thus, if a discharged employee demands it, the employer must give a letter stating specific reasons for the dismissal. It is a good practice to do so even if the employee does not demand it.

Dare v. Montana Petroleum Marketing Co. (1984)

In this case, the Montana Supreme Court significantly expanded its recognition of the covenant of good faith and fair dealing. Jacqueline Dare worked for six months as a cashier and station attendant at a Husky station, owned by Montana Petroleum Marketing Company. One winter's day, she fell in her yard when coming home from work. She went to the hospital and was given a neck brace to wear. The next day, she tried to get a coworker to work her shift for her, but the other person couldn't help out. Dare went to work. Three hours later, she called the station manager, saying she wasn't sure she could complete her shift. The manager told her to try. Dare took some pain pills and threw up in a garbage can. A customer called the manager to tell him about Dare's condition. The manager called Dare back and said he would come in to work for her and that she was fired.

Dare filed suit against the company. The manager alleged her performance was substandard and that he had warned her on several occasions about specific issues of performance and conduct. Dare disputed the manager's statements, saying that the "warnings" were general statements made to all employees. She admitted that the manager had once told her to improve her performance or be fired, but she also claimed the manager had later told her several times that she was doing an excellent job. District Court granted summary judgment to the company on two grounds: there was no public policy violation in the discharge, and no covenant of good faith and fair dealing could be implied because the employer had no handbook outlining a discharge procedure, as in the Gates case.

The Supreme Court reversed the judgment. On the issue of public policy, the District Court had said no law or administrative rules had been ignored or misapplied. The Supreme Court held that "[p]ublic policy violations may conceivably arise on other facts or theories" and that Dare was entitled to develop her argument.

More importantly, the court dealt at length with the covenant of good faith and fair dealing. The court held that "an employment handbook as promulgated by the employer in *Gates* is not essential in a cause of action for breach of the implied covenant of good faith and fair dealing. Implication of the covenant depends on existence of **objective manifestations** by the employer giving rise to the employee's reasonable belief that he or she has job security and will be treated fairly." (emphasis added)

The court found evidence of such "objective manifestations": 1) Dare had been given a pay raise and insurance benefits after three months of employment, and she had been promised another raise; 2) Dare said the manager had told her wanted her to learn to do the station's bookkeeping; 3) the company had a written policy that an employee who showed independence and initiative would "most likely have a station of his own in the not too distant future." Although the company denied the Dare had any basis to believe she had job security, the court held that these objective manifestations

were sufficient "issues of material fact" to warrant a trial before a jury.

In a special concurring opinion, Justice Morrison argued even more strongly for the covenant of good faith and fair dealing while defining the at-will statute: "First, it should be made clear that this Court has not modified the 'at will' statute. Courts cannot amend statutes."

However, Morrison wrote, "[t]he statue refers to the term of employment but has nothing to do with the obligations owed by either party to the other. In other words, even though employment may be terminated at will, if a legal obligation is breached, that breach may give rise to separate tort action.

"The covenant of good faith and fair dealing is implicit in every employment contract irrespective of a reasonable belief regarding job security. The law imposes an absolute obligation upon employers to deal fairly and in good faith with their employees from the commencement of the employment relationship.

"An employer, under the 'at will' statute, has the right to terminate. However, if the employer violates the legal obligation to treat the employee fairly and in good faith, then separate and independent tort action can be instituted by the injured employee against the offending employer. Damages, not reinstatement, is the remedy."

Morrison also argued that the definition of wrongful discharge as a public policy violation was dead. When the court, in Gates II, recognized the tort of breach of the covenant, the "new" tort subsumed the "old" tort. "All public policy violations would undoubtedly involve a breach of covenant of good faith and fair dealing."

Keep in mind, though, that Morrison's opinion did not reflect the majority view of the court.

European Health Spa v. Montana Human Rights Commission (1984)

This case involved a charge of marital discrimination. Violet Haddow had worked for the health spa as a membership salesperson. Her husband was the spa manager. While Violet was on vacation, her husband was fired for fiscal hanky-panky. Violet came into the spa two days later and created quite a commotion, saying they were going to sue the spa and leveling accusations at the ownership. At that time, she was called on the carpet and fired.

Haddow filed a marital discrimination complaint with the Human Rights Commission (HRC). In hearing, the spa claimed Haddow knew of her husband's activities, that she failed her duties as assistant manager, that she fell behind in sales, and that she was grossly insubordinate at the spa on the day she was fired. Haddow responded with her excellent sales record, a document contradicting that she was ever assistant manager, and a termination notice that showed the same dates of preparation and effect as her husband's notice.

The hearings officer found for Haddow. In a full hearing before the HRC, the Commission also found for Haddow and increased the award to $7500 back pay. The spa sued the HRC. District Court sent the case back to the HRC, saying the Commission had not sufficiently reviewed the record before increasing the award. The HRC reconsidered the case, reviewed the record, and kept the same award. The case returned to District Court, which affirmed the award and tacked on attorney's fees.

The spa appealed to the Supreme Court, which affirmed the District Court decision. In the matter of the discharge, the court commented that although Haddow had done actions that might have led to a legitimate discharge for cause (her insubordination), these occurred after the spa had already decided to fire her. Therefore, the spa's allegations against Haddow did not belong on the record. Haddow was fired because she was married to the fired manager, and this constituted marital discrimination. The court charged that the spa did not follow the law or its own policy.

Welsh v. City of Great Falls (1984)

Dennis Welsh, a fire captain for the City of Great Falls, was unabled to continue in his job because of poor health. After three informal meetings with the fire chief, he was discharged. He filed suit against the city, claiming that due process required the city to provide a hearing before he was discharged. The city claimed the Welsh voluntarily retired. Assuming he was discharged, said the city, no hearing need be offered in the case of physical disability. And assuming a hearing was required, the city maintained that the meetings with the fire chief and the offer of an exit interview with the city personnel officer fulfilled the requirement.

At issue are the statutes governing firefighters. MCA 7-33-4122 provides for the appointment of a firefighter and states that he shall hold the job during good behavior and as long as he is physically able to do the job. MCA 7-33-4123 authorizes the fire chief to suspend a firefighter for neglect of duty or violation of rules. MCA 7-33-4124 outlines the hearing procedure to be followed in cases of suspension.

The Supreme Court held that "this statute provides no hearing remedy for one who is terminated for physical disability. Reading the three statutes together, as we must, they apply only to situations where neglect of duty or violation of rules is the alleged reason for termination. However, notwithstanding the statutory deficiency, we hold that section 7-33-4122 creates a property interest . . . and therefore Welsh could not be terminated without first being given the opportunity for a hearing before an impartial tribunal."

After this finding, the court ruled that "[t]he argument that the meetings between Welsh and the fire chief and operations officer satisfied the hearings requirement cannot be taken seriously." The court voided Welsh's termination and ordered full pay and benefits from the time of termination until final disposition of the case. It also ordered the city to afford Welsh his hearing. Thus the court, by a four-to-three majority, reaffirmed the due process rights of persons who hold a property interest in a job. In this case, the court said the specific law required a hearing before termination, even while it said the hearing procedure stated in the law did not apply to physical disability. In dissent, Justice Weber stated that a hearing after the termination would have satisfied Welsh's constitutional right to due process.

Crenshaw v. Bozeman Deaconess Hospital (1984)

In this important case, the court further expanded the covenant of good faith and fair dealing. Shirley Crenshaw had worked as a respiratory therapist with an independent company that contracted its services to the hospital. The hospital purchased the company and hired Crenshaw as a respiratory therapist. The hospital's policy provided for a 500-hour probationary period for new employees. At the time of Crenshaw's discharge, she was still in probationary status.

The discharge came about on a complaint from three intensive-care nurses. Following a meeting between the nurses and hospital officials, a discharge memo was written. It charged Crenshaw with insubordination, disrupting the continuity of care, continually getting in the way of patient care, disorderly conduct, unsatisfactory work performance, violation of safety and health rules, and breach of confidentiality. Subsequently, Crenshaw met with the hospital administrator to discuss the matter. The administrator then interviewed persons present during the events that lead to the charges. The administrator finalized the firing. After her discharge, Crenshaw tried to get unemployment insurance benefits. The hospital told Job Service she had been discharged for unsatisfactory work performance and endangering patient well-being. Thus, Crenshaw was unable to find work in the Bozeman medical community.

Crenshaw filed a lawsuit and, in trial, disputed the charges the hospital had made. She introduced evidence to show that the charges were false, and that the administrator had failed to interview key witnesses to the events that led to her discharge. She alleged the hospital had removed a certificate from her personnel file. She also called an expert witness to testify on the breach of the covenant of good faith and fair dealing. The jury found for Crenshaw, awarding $125,000 compensatory damages and $25,000 punitive damages. The hospital appealed to the Supreme Court on four issues: 1) whether an at-will probationary employee is covered by the covenant of good faith and fair dealing, 2) whether the record sustained a separate action based on negligence, 3) whether the expert witness's testimony was admissable, and 4) whether the award of punitive damages was proper.

The court held that "even in probationary employment relationships, the employer still owes his employee a duty of good faith and fair dealing." However, the court also referred to *Dare* and said there were "objective manifestations" that led Crenshaw to believe her job was secure: 1) all of her previous contracted work had been at the hospital, 2) the hospital provided her with health insurance and a medical discount — benefits it extended only to permanent employees, 3) the hospital made no reference to her probationary status in its discharge memo or the administrator's discharge letter.

The question then arises, does the court consider all employees to be covered by the covenant (as Justice Morrison argued in his opinion in *Dare*), or only those employees who can show objective manifestations that lead them to believe their jobs are secure? In *Storch*, the court agreed that probation is a period for evaluating an employee before granting job security. Thus, even though Crenshaw's case showed objective manifestations, the court seems to say that these are not necessary:

"We hold that the 'at-will' statute is very much alive. . . . There is no legitimate precedent for an exception for probationary employees. Therefore, Crenshaw even as a probationary employee was owed a duty of good faith. This requirement of good faith and fair dealing does not conflict with [the law], but merely supplements it. Employers can still terminate untenured employees at-will and without notice. They simply may not do so in bad faith or unfairly without becoming liable for damages. The Hospital's notification to the Bozeman Job Service of Crenshaw's unsatisfactory work performances deprived her of employment in the local medical community. This was an act of bad faith. The charges and allegations in the discharge memorandum were false. The charges were serious and resulted in Crenshaw losing her employment as well as jeopardizing her career. This was an act of bad faith. The record shows that Crenshaw's discharge was motivated by bad faith and warrants recovery for breach of implied covenant of good faith and fair dealing . . . ."

On the issue of negligence, the Supreme Court agreed with the District Court's finding. The hospital's failure to properly investigate its charges against Crenshaw constituted negligence. The court also allowed the testimony of the expert witness to remain on the record. The court acknowledged that the covenant is a complex issue. "[Dr. Vinton's] testimony assisted the trier of fact by providing the jury with information and a perspective beyond the common experience of a lay juror."

Finally, on the issue of punitive damages, the hospital noted that Crenshaw's discharge happened in the period between the two Gates decisions. The first decision affirmed the covenant of good faith and fair dealing, but it wasn't until the second Gates decision (after Crenshaw was fired) that the Supreme Court upheld punitive damages for breach of the covenant. Thus, the hospital argued it had not been "put on notice" that its actions may make it liable for damages. The court disagreed, saying the first Gates decision put the hospital on notice to deal fairly and in good faith, and that the hospital's negligence was another basis for punitive damages.

Conboy v. State of Montana and Ethel Harrison (1985)

Richard Conboy served in the capacity of Deputy Clerk of the Supreme Court for 20 years. In 1982, he ran for Supreme Court Clerk, an elective office. He lost the race to Ethel Harrison, who appointed a woman younger than Conboy to the Deputy Clerk office. When Harrison took office, she removed Conboy from the payroll.

Conboy filed suit, claiming Harrison had discriminated against him on the basis of sex, age, and political beliefs. District Court dismissed the case through summary judgment. Conboy appealed to the Supreme Court, which affirmed the District Court decision.

For one thing, the court said, Conboy had never been appointed in writing to the Deputy Clerk position, as required by law, and he had never taken an oath of office, also required by law. Thus, the Deputy Clerk office had been legally vacant for 20 years; Conboy had merely been acting in the capacity as a "de facto public officer." When Harrison legally appointed the new clerk, his employment ended. The court held that, since Conboy did not hold public office under a valid appointment, his removal from office was not a question for the court to decide.

On the discrimination matter, the court noted that the only evidence Conboy submitted was his own allegations. When Harrison filed a motion asking summary judgment, Conboy introduced no other evidence to support his claim of discrimination. Thus, by the rules of civil procedure, the District Court's grant of summary judgment was proper. The Supreme Court concluded, "In the absence of a factual showing of discrimination, we do not rule upon whether it may be unlawful for an elected public officer to discriminate on the basis of sex, age or political affiliation in the discharge or appointment of a deputy."

Poor Richard got no relief.

Pryor School District v. Supt. of Public Instruction, et al. (1985)

A nontenured school principal in Pryor was discharged on four counts of misconduct. He appealed the action to the Big Horn County Superintendent of Schools. The superintendent held a hearing and found that the discharge had not been for cause. The superintendent ordered the school district to reinstate the principal and compensate him for lost salary.

The school district appealed that decision to the state Superintendent of Public Instruction. At that time, the district tried to introduce new affadavits into the record. The state superintendent

disallowed the new evidence. He said the evidence in the hearing at the county level had been sufficient, and besides, the new affadavits were sloppy — with passages whited out, pasted over, and handwritten on. He upheld the county superintendent's decision.

The school district sued the state superintendent, saying that he should have allowed the affadavits to be entered into the record. District Court agreed with the superintendent, so the school district appealed to the Supreme Court. The Supreme Court affirmed the District Court decision, saying that the county hearing was sufficiently thorough, and the new evidence would add nothing to the case.

Flanigan v. Prudential Savings and Loan Association (1986)

In this decision, the Supreme Court reaffirmed many of the decisions already discussed. Mildred Flanigan worked for Prudential for 28 years in various positions; her performance was satisfactory throughout her career. She had reached the position of assistant loan counselor, but that job was to be eliminated in a reduction in work force. Prudential offered her a chance to attend a week-long teller training program in Salt Lake City. She accepted, and after returning from training, she began work as a teller. About three weeks later, she was discharged without notice or a hearing.

Within two weeks, Flanigan filed an age discrimination complaint with the Human Rights Commission. While that action was pending, Prudential offered Flanigan a part-time teller position, 14 months after they had fired her. She turned the job down. The HRC did not act on her complaint, but issued a "right to sue" letter. Flanigan filed suit in April, 1983 — three years after her discharge.

The jury in District Court decided in favor of Flanigan. It awarded $94,000 in compensation, $100,000 for emotional distress, and $1,300,000 in punitive damages. Prudential appealed to the Supreme Court, which found six issues to decide: 1) was there enough evidence to justify submitting Flanigan's breach of covenant case to a jury? 2) was negligence an admissable charge against Prudential? 3) was it proper to admit the testimony of an expert witness? 4) should Prudential have been allowed to introduce "after-acquired" evidence into the trial? 5) should the back wages award have been reduced, since Flanigan turned down the part-time teller position? 6) was there enough evidence to allow the jury to award punitive damages, and were the damages excessive?

In trial, Prudential had given conflicting reasons for Flanigan's discharge. At first, the manager testified she was laid off in a RIF action. Later, he said she was fired for poor performance. He also testified that any errors she made as a teller did not warrant discharge. The manager admitted that Flanigan was never warned, reprimanded, or counseled about her performance, although Prudential's policies require such actions before termination. Prudential supervisors testified that most new tellers require two to six months to become proficient, yet Flanigan was fired after three weeks.

The court's opinion discussed at length the covenant of good faith and fair dealing, relying on the *Dare* case as precedent. The court concluded, "The covenant, in a long-term employment situation, only requires the employer to have a fair and honest reason for termination. . . . From the evidence presented, the jury could have found that appelants had no fair and honest cause for discharge and, in fact, had ulterior motives." On this basis, Flanigan had a good case for wrongful discharge.

On the negligence issue, the court referred to *Crenshaw* as precedent and allowed the finding to stand. In Flanigan's case, Prudential committed 13 violations of its own policies, including failure to review Flanigan's prior work history and performance before deciding to discharge her. Also relying on *Crenshaw* as precedent, the court allowed the testimony of an expert witness to remain on the record, in answer to the third issue above.

The fourth issue concerned an attempt by Prudential to introduce into the trial a summary of teller transactions from a few of the days that Flanigan worked as a teller. Prudential said the summary provided evidence of Flanigan's poor performance. However, the summary was not known to Prudential prior to Flanigan's discharge and could not have been used as a basis for the decision to fire her. As such, it was evidence acquired "after the fact," and based on the *Swanson* precedent, the summary was inadmissable.

The fifth issue concerned the compensation awarded by the jury. Since Prudential had offered Flanigan a part-time job after her termination, the company argued that the compensation should be reduced by about $26,000 — the amount Flanigan would have earned in the part-time position. The court stated that, although a discharged person has a duty to seek employment, he or she does not have to accept inferior employment. The part-time offer was inferior to Flanigan's former full-time job. Flanigan's refusal of inferior employment could not result in reduced damages.

Lastly, the court considered punitive damages. In addition to the evidence showing breach of the covenant, the court referred to testimony by Prudential's president that referred to older employees as "dead wood," "old dead wood," and "ballast." All the evidence was sufficient, the court said, the justify a jury's award of punitive damages.

Prudential argued that $1.3 million in punitive damages was excessive and should be set aside. State law allows a court to vacate damages if they appear have been based on passion or prejudice. However, the court refused to consider the question: "[Prudential] failed to raise the issue of excessiveness in post-trial motions. The Court need not now consider that contention on appeal." Anyway, the court said, "'[t]he amount to be awarded as damages is properly left to the jury and this Court will not substitute its judgment for that of the jury . . .' While the punitive damages in this case are large, they are within the discretion of the jury. . ."

The court made its decision by a four-to-three majority. However, the only issue on which the minority dissented was the amount of punitive damages. On all other issues, the court appeared to agree unanimously.

Dawson v. Billings Gazette, et al. (1986)

Patrick Dawson had been a reporter for the Billings *Gazette*. When he was dismissed, he filed suit against the newspaper, alleging breach of the covenant of good faith and fair dealing. In a jury trial, Dawson won his suit — sort of. The jury found that the *Gazette* had breached its duty of good faith and fair dealing. However, the jury awarded zero damages, compensatory or punitive.

Dawson asked for a new trial and was turned down. He then appealed to the Supreme Court. The Court upheld the jury award on three grounds: 1) Dawson had three sources of income after his discharge (severance pay from the paper, unemployment insurance, and freelance fees); 2) he failed to mitigate his damages — i.e., he did not diligently pursue comparable full-time work after he was fired; 3) he did not sufficiently prove he had been damaged.

In upholding the district court's refusal to grant a new trial, the Supreme Court noted that "the District Court must respect the jury's decision when conflicting evidence is present, as is the case here. To grant a new trial in light of conflicting evidence would be an abuse of discretion."

Mead v. McKittrick, et al. (1986)

June Mead worked for Cascade County in the district court. She started work in 1976 as a deputy clerk. In 1979, she advanced to the position of personal secretary to Judge William Coder. Judge Coder resigned from the bench in 1983, and Thomas McKittrick was appointed to replace him. The new judge told Mead that he planned to open her position for applications. She applied but was not interviewed. McKittrick then discharged her.

Ten days later, McKittrick sent Mead a letter, stating the reasons for dismissal. Mead said the letter merely outlined work patterns she had established with Judge Coder. She said the discharge was unfair, as McKittrick had told her to continue with her previous duties.

In mid-1984, Mead filed suit against McKittrick, the county commissioners, and Cascade County, alleging violation of due process, breach of contract, breach of the covenant of good faith and fair dealing, wrongful discharge, and fraud. The judge and commissioners claimed immunity from suit and asked for dismissal. The district court agreed, holding further that Mead was a court employee, not a county employee, and therefore "at-will."

Mead appealed the dismissal. The Supreme Court held that "historically, judges have enjoyed absolute immunity for judicial acts." Further, the court said, "the appointment and removal of key court employees is an effective judicial action." The court reasoned that the personal secretary was highly important to the efficiency of the court, thus occupying "a distinct and unique status among district court employees."

Since the court found McKittrick's action to be a "judicial act," the court also found the county and commissioners to be immune from suit. State law provides that "The state and other governmental units are immune from suit for acts or omissions of the judiciary."

In dissent, Justice Morrison felt that "judges, in the treatment of their personnel, are subject to the

same rules to which others in society are subject." He would separate judicial acts from administrative acts, which he felt Mead's dismissal was. Further, Morrison felt the county was not immune, since it had independently reviewed and approved the judge's decision to fire Mead. "While the county is immune for Judge McKittrick's acts, the county is responsible for its own conduct."

Justice Hunt dissented along similar lines. He said the majority opinion "does not adequately treat the issue of the county's responsibility in this matter, the county's conduct as an employer is improperly ignored." Both Morrison and Hunt said that Mead was a county employee, and therefore entitled to the rights and due process granted her by county policy.

Miller v. Catholic Diocese of Great Falls, et al. (1986)

Mary Miller taught fifth and sixth graders in Billings at the Little Flower School, a part of the Catholic school system administered by the diocese. Her first year of employment was rewarded with "outstanding" ratings in every category of her evaluation. The next year, though, Miller was under the supervision of a new "head teacher." This supervisor did not approve of Miller's teaching methods, particularly her "lack of discipline" in the classroom.

The head teacher talked with Miller on more than one occasion about the problem. Miller cited her previous evaluation, and felt that the problem was not discipline, but a difference of opinion on teaching methods. The school administrator, a priest, soon got involved in the dispute. He reflected on his own experience in Miller's classroom. He provided a few hours of religious instruction to the class each week, and he felt the lack of discipline there made the task difficult. Before the end of the first semester, the administrator fired Miller, stating the cause as lack of discipline in the classroom. Miller filed suit, saying the church had breached the covenant of good faith and fair dealing, particularly in not offering a hearing or other opportunity to defend herself. District Court granted summary judgement to the diocese on the grounds that applying the tort of breach of covenant would interfere with freedom of religion. Miller appealed.

The Supreme Court concluded that the case could present a question of breach of the covenant of good faith and fair dealing. However, by a four-to-three majority, the Court affirmed summary judgment on the issue of religious freedom.

The reason for dismissal involved discipline in the classroom. "The suggestion is made that consideration can be given to methods of discipline without becoming involved with claims which are rooted in a religious belief," the majority said. "A judicial determination of the presence or absence of good faith on the part of [the administrator] would require the court to examine the school's discipline policy as applied to classroom instruction covering both religious and nonreligious subjects, and to evaluate [the administrator's] interpretation and application of that discipline policy. Such an examination of necessity would impinge upon elements of the teaching of religion, or the free exercise of religion."

In dissent, Justice Morrison disputed that the case involved the teaching of religion. "Plaintiff's case here is premised upon the fact that she was denied due process in connection with her termination. She was not afforded an opportunity to change. She was not given a hearing in which she could explain her position. Although the church is entitled to set whatever standards it wants respecting and imparting religious education to its students, the law does require that certain fair procedures are necessary in order to accord due process." (Technically, "due process" does not apply here, since Miller's termination does not involve a state action. Rather, such notice and hearing are broadly accepted elements of "fair treatment" by a private employer.)

Justice Hunt also dissented. He criticized the majority's legal reasoning, saying "a wealth of case law indicates that although federal and state courts have no jurisdiction over solely internal ecclesiastical affairs or the validity of religious beliefs, they may exercise jurisdiction over torts incurred by religious institutions and in church controversy which impinges on property or civil rights." He continued, "In the present case the application of the tort of good faith and fair dealing to the church-operated school does not require a determination of the validity of a religious belief. A clergy administrator's role, in itself, does not bar application of the tort of good faith or any other common law tort."

Brinkman v. State of Montana, et al. (1986)

When this case came before the Supreme Court, the sole question concerned whether a person may be

barred from suing for wrongful discharge because he or she has failed to exhaust contractual reme-dies under a collective bargaining agreement. On that point, the Court affirmed summary judge-ment by the District Court in favor of the employer.

Albert Brinkman was a correctional officer at the Montana State Prison. In June, 1982, he suffered an industrial injury; he applied for and received workers' compensation. Over the next year, he took leave from his job several times, citing a continuing disability from the injury. In July, 1983, he had been on leave for several months. The prison sent him a letter requesting that he submit some leave forms and a doctor's statement. The prison set a deadline for the return of the forms, after which it would consider Brinkman on unauthorized leave subject to discharge.

Brinkman stated the forms were not enclosed with the letter. His wife said the prison extended the deadline and promised to send the forms; she said the forms never came. In any event, Brinkman did not provide the requested information by either deadline.

In August, Brinkman went to the prison with a doctor's statement releasing him to return to work. The prison told him he had been fired and could not enter the prison. At that time, Brinkman tried to contact a union representative who was at work in the prison. The gate guard made a number of calls to the representative for Brinkman, but the representative never showed up. Finally, Brinkman left the prison; he made no further attempt to contact the union.

Brinkman filed suit against the state, claiming the prison had 1) fired him in retaliation for his industrial injury, and 2) violated the covenant of good faith and fair dealing. The prison asserted that Brinkman could not sue, since he had not used the grievance procedure in collective bargaining agreement.

The Court found that 1) Brinkman was a member of the union; 2) the union said he was covered by the collective bargaining agreement as long as he was an employee; 3) the prison considered him an employee until the time of his discharge, and 4) the contract grievance procedure was available to challenge discharge. Given these facts and several precedents, the Court held that Brinkman could not sue in court without having gone through the grievance procedure first.

In addition, the Court refused to consider Brinkman's claim that the prison had breached the covenant of good faith and fair dealing. "In this case, the [collective bargaining agreement] provided that the employer could only discharge employees for 'just cause.' Therefore, we will not imply the covenant of good faith and fair dealing into this employment relationship." The Court reasoned that the covenant applies to at-will employment situations; where the employment is covered by an explicit contract (the collective bargaining agreement), no other covenant need be implied.

Smith v. Montana Power Company (1987)

This case bears some similarity to the *Brinkman* case above. John Smith began employment near the end of 1981 as an instrument and control journeyman for MPC at Colstrip. During his employment, he belonged to the electrical workers union. In September, 1982, he was fired.

Smith claimed that he tried to file a grievance under the collective bargaining agreement, but that MPC refused to discuss the case with the union representative. The company claimed that Smith failed to exhaust the grievance procedure. District Court granted summary judgment to MPC as a matter of preemption, i.e., federal labor law preempted Smith's tort claim under state common law.

On appeal, the Supreme Court found that "the issues surrounding Mr. Smith's discharge are questions of federal contract interpretations." The Court concluded "that the District Court did not err in holding that Mr. Smith's negligence and good faith claims were preempted by federal law. This decision is necessary to insure a unified body of labor-contract law and preserve the central role of arbitration in labor disputes." As a final note, the Court cited the *Brinkman* case. Although District Court had ruled on the basis of preemption, the Supreme Court noted that the failure to exhaust a grievance procedure, as in *Brinkman*, might also apply.

Kerr v. Gibson's Products Company of Bozeman (1987)

Penny Kerr worked five and one-half years for Gibson's, starting in 1978. Gibson's terminated her employment in what it termed was a lay-off for economic reasons. Kerr had performed satisfac-torily throughout her employment, advancing from her initial clerk position to department head. She never received disciplinary action, but did receive a bonus in 1983.

Beginning in 1980, Gibson's went through a period of economic difficulty. In February, 1984, the company terminated Kerr during her shift, without notice or severance pay. Contrary to policies stated in its handbook, Gibson's did not offer a transfer, reduced hours, or reduced pay, nor did it provide recall rights. The handbook also promised layoffs would occur without prejudice, yet it placed "No Rehire" in Kerr's termination report. It refused to provide her a reference letter. Gibson's called the action a reduction in force, yet replaced Kerr within four months with a lower paid employee.

Kerr sued and won her case in district court. Gibson's appealed. The Supreme Court found that Gibson's handbook and other "objective manifestations" in Kerr's employment implied the covenant of good faith and fair dealing. "As an employer, Gibson's was freely able to enforce employee handbook rules of conduct. It likewise follows that Kerr, as an employee, could reasonably rely on the procedures outlined in Gibson's employee handbook during employment termination." Citing *Gates* and *Dare*, the court upheld the trial court's procedures. On a second issue, the court upheld the compensatory damages ($59,026) awarded by the jury. The award included "prospective pay" through 1989, when Kerr had planned to start raising a family. It also included Kerr's share of Gibson's profit-sharing plan, which was disbursed after her termination when Gibson's sold out to another company. Here, the court affirmed expert testimony that guided the jury in setting the amount of compensatory damages.

McClain, et al. v. NERCO, Inc., and Spring Creek Coal Co. (1987)

NERCO/Spring Creek mined coal at Decker. Their major contract customer was a group of Texas utilities, the "Houston Group." On July 15, 1982, the Houston Group filed suit against NERCO and Spring Creek seeking to permanently reduce the amount of coal it had to accept monthly under contract. On July 21, the parties to the suit negotiated a tentative settlement allowing reduced quantities of coal. On July 23, Spring Creek laid off half of its work force. On July 28, NERCO, Spring Creek, and the Houston Group signed an Interim Agreement allowing dismissal of the Houston Group lawsuit.

After the lay-off, 65 coal miners filed suit against NERCO and Spring Creek. They sought relief under a number of different theories. In time, settlement was reached on all issues save one: the miners alleged in a "fourth amended complaint" that Spring Creek had assured them of job security based on the long-term coal contract. Further, they alleged that NERCO, Spring Creek, and the Houston group conspired to bring a sham lawsuit, creating grounds for the massive lay-off. This conspiracy, plaintiffs said, constituted a breach of the implied covenant of good faith and fair dealing.

District Court granted summary judgement to NERCO and Spring Creek, and the plaintiffs appealed. At issue before the Supreme Court was whether the District Court had erred in granting summary judgement.

First, the Supreme Court disposed of the issue of implied job security. With the fourth amended complaint, all parties had agreed to dismiss with prejudice all other claims arising in the suit. Since the fourth amended complaint dealt only with the conspiracy claim, the issue of job security could not be considered.

As evidence to support the conspiracy theory, the miners offered only the timing of the events occurring in quick succession: 1) Houston Group filed lawsuit, 2) NERCO and Spring Creek negotiated with the Houston group, 3) Spring Creek laid off employees, and 4) NERCO, Spring Creek, and the Houston group reached an Interim Agreement. NERCO and Spring Creek presented extensive documentation that its financial crisis was real and the Houston Group lawsuit was genuine. The Supreme Court concluded, "plaintiffs have not presented any evidence of a conspiracy. There is no genuine issue of material fact." Thus, the grant of summary judgement was affirmed.

Nordlund v. School District No. 14, et al. (1987)

James Nordlund began teaching at Malta High School in 1956. In 1966, he became district superintendent, under written contract with the school board. From 1966 to 1983, Nordlund worked under a series of two-year contracts. In January 1983, the school board offered a one-year contract for the 1983-84 school year. The contract contained no option for renewal, nor did it refer to the possibility of renewal.

In January, 1984, the school board decided not to renew Nordlund's contract beyond June 30, 1984. It took this action in full compliance with state law. Nordlund sued the district for breach of contract, breach of the implied covenant of good faith and fair dealing, and negligent infliction of emotional distress. He then amended his complaint to say that the contract was "open-ended," rather than for a definite term, and that the school board had violated the Open Meetings Law when it voted not to renew his contract. District Court dismissed the lawsuit, noting the plaintiff failed to state a claim on which relief could be granted. Nordlund appealed, saying the District Court erred in interpreting his contract as an express contract for one year.

The Supreme Court noted that "[w]here the language of a written contract is clear and unambiguous there is nothing for the court to construe." Further, the court said, "[c]ourts have no authority to change the contract or disregard the express language used." The Supreme Court agreed with District Court that "the contract [was] sufficiently clear and unambiguous in its intent." Further, the court noted, since superintendents may not acquire tenure in their positions, no implication for renewal could be read into the contract. Thus, the dismissal was correct, for "[t]here was no ambiguity for which the district judge was required to submit the case to a jury for a factual determination."

On the breach of covenant issue, the Supreme Court reiterated that the school board followed all its legal obligations in dealing with Nordlund's contract. "[B]ecause no breach of contract occurred, it cannot be said that the school board breached the implied covenant of good faith and fair dealing." In affirming the lower court's dismissal, the Supreme Court agreed that "no set of facts would support Nordlund's claim of a contract for an unspecified term, or 'open-ended' term ..."

Anderson and Anderson v. TW Corporation, et al. (1987)

Robert Anderson was employed in the garage operated by TW Services in Yellowstone National Park. he began work in 1970, and from 1971 until his resignation in July, 1982, he served as shop foreman. Throughout his employment, he was a member of the International Association of Machinists and Aerospace Workers union. In June, 1982, Anderson was involved in the clean-up of a degreaser (Tensene) spill. He developed a skin allergy from contact with the substance and went on sick leave. His doctor advised him to avoid all contact with petroleum products.

While Anderson was on sick leave, the company changed his job description, requiring 75% mechanic work and 25% supervisory work. This change would make it unavoidable for Anderson to come into contact with petroleum products. The union represented Anderson in a grievance, and by mutual agreement, the company would return Anderson to his former position. Anderson continued to object to the job description but said the union refused to proceed any further with his claim. Anderson quit and filed suit against the company, alleging "constructive discharge." In the same suit, his wife, Violet Anderson, stated a claim for damages due to emotional distress and mental anguish resulting from the company's actions with her husband.

District Court granted summary judgement to TW Services on all issues of the suit, stating that Anderson's claims were preempted by federal labor law. Anderson appealed. The Montana Supreme Court cited U.S. Supreme Court decisions and its own decisions in affirming the District Court decision. (See *Brinkman* and *Smith* above.) The Court cited the U.S. Supreme Court's findings that "plaintiffs may not avoid the preemptive effect of federal labor law when a dispute involves an interpretation of a union contract by pleading in tort."

Barnes v. Koepke and Big Springs and Glacier County (1987)

This lawsuit was brought against Glacier County and two of its commissioners by Ronald Barnes, the discharged administrator of the hospital in Cut Bank. Barnes, however, was not a county employee; he had been hired by Brim and Associates, a hospital management firm under contract to the Glacier County Hospital Association, a non-profit corporation leasing the hospital from the county. Barnes began his tenure as administrator in 1981. Very quickly, disagreement and dissension arose between Barnes and much of the hospital staff. In October, 1983, the hospital staff demanded that the Hospital Association fire Barnes, but it refused to do so.

On June 30, 1984, the county commission voted to not renew its lease with the Hospital Association. Subsequently, Brim and Associates fired Barnes. Barnes's lawsuit against the county alleged that the commissioners' personal dislike of him led them to terminate the lease for the sole purpose of securing Barnes's discharge.

In District Court, the defendants moved for and received a dismissal. The basis of this action was the legislative immunity statute (2-9-111, MCA):

Immunity from suit for legislative acts and omissions. (1) As used in this section: (a) the term "governmental entity" includes the state, counties, municipalities, and school districts; (b) the term "legislative body" includes the legislature vested with legislative power by Article V of the Constitution of the State of Montana and any local governmental entity given legislative powers by statute, including school boards.
(2) a governmental entity is immune from suit for an act or omission of its legislative body or a member, officer, or agent thereof.
(3) A member, officer, or agent of a legislative body is immune from suit for damages arising from the lawful discharge of an official duty associated with the introduction or consideration of legislation or action by the legislative body.

The Montana Supreme Court upheld the dismissal, saying that the statute clearly provides immunity for the county and the commissioners. The decision not to renew the lease was clearly a legislative action. Barnes tried to make the case that acts committed in bad faith and with malice should not be considered the "lawful discharge of an official duty." The Court refused to examine the motives for the commission's action; the commission had the authority to renew or not renew the lease, so it was immune from lawsuit.

Belcher v. Department of State Lands (1987)

Herb Belcher was hired in September, 1980, as a communications engineer for the Department of State Lands's Fire Suppression Bureau in Missoula. In 1982, his supervisor began receiving complaints about Belcher's work. Among other allegations, the complaints stated that Belcher's work on the statewide communication plan he was responsible for was inadequate. Belcher received a disciplinary memo in January, 1983, concerning the private use of a state vehicle.

In April 1983, Belcher was told to concentrate on the statewide plan to the exclusion of all other work activities. Problems continued with Belcher's work, and his supervisor continued to document all evidence that came to his attention. In January, 1984, Belcher was given a notice of corrective discipline. It informed him of the grounds for disciplinary action, what improvements were needed, and the possibility of termination if his work did not improve. Belcher was given 60 days to correct his performance deficiencies and became subject to weekly performance evaluations. Belcher's performance did not improve, despite frequent meetings with his supervisor. In April, 1984, the department fired Belcher.

Belcher filed suit against the department in February, 1985, alleging that the department fired him without just cause. He further claimed that the department violated public policy, breached its contract of employment with him, and breached the covenant of good faith and fair dealing. District Court granted summary judgement in favor of the department. On appeal, the Montana Supreme Court agreed: "Belcher was not doing his job; he had received notice that his work was not adequate; he failed to rectify the situation, and he was subsequently discharged. It appears to us that no basic question of fact exists for jury determination and Belcher does not raise any specific fact question."

The Court went on to conclude that "[s]upervisors had issued reprimands, notices of corrective discipline, and notices of punitive discipline throughout Belcher's 43 months of employment. He had the chance to rebut these charges, but chose not to do so. He had the right of grievance, but failed to exercise it. Furthermore, Belcher was unable to show the District Court that public policies were affected by dismissal other than his own belief that just cause was violated."

"It is clear from the record, the deposition of Belcher, and Belcher's own conduct that he knew his job was in jeopardy. The Department repeatedly attempted to help him until the situation was out of control. These particulars represent notice to Belcher that he had to improve or risk discharge. The Department recognized the duty to act in good faith and abided by it."

Malloy and Malloy v. Judge's Foster Home Program, Inc. and Vaughan (1987)

From 1982 to 1985, Tom and Harriet Malloy worked under contract as group home parents at Discovery House, a group home operated in Anaconda by Judge's Foster Home Program. In 1985, Judges's contracted solely with Harriet Malloy; Tom was not a party to the contract nor was he named anywhere in the contract.

In April, 1986, a social worker witnessed an incident in which Tom Malloy verbally abused a client in the group home. Harriet Malloy was also present. The social worker filed a complaint with the Discovery House Director, Sister Gilmary Vaughan. Harriet Vaughan was suspended, pending an investigation by the Department of Social and Rehabilitation Services, which licensed the program. SRS found Tom Malloy culpable for the abuse and Harriet Malloy negligent for not intervening.

Sister Vaughan then sent Harriet a letter, outlining conditions for continued employment and directing her to return to work a week later. Harriet did not agree with the letter and did not return to work as directed. She asked for a hearing on the complaint against Tom, but Discovery House refused to grant one. About three months later, Discovery House terminated Harriet's contract for her continued refusal to return.

The Malloys filed suit, alleging breach of contract , violation of public policy (denial of due process), and breach of the covenant of good faith and fair dealing. District Court dismissed the suit, and the Malloys appealed. The Supreme Court upheld the dismissal. Tom Malloy had no grounds to sue; he was not a party to the contract between Discovery House and Harriet, and there was no other employment relationship involving him. On Harriet's claim, the Court pointed out that "[i]t is a well settled rule of contract law that a party who commits the initial breach cannot complain of a subsequent breach by the other party." Since Harriet breached the contract by not reporting to work as directed, she had no grounds to complain that Discovery House had breached the contract by terminating it.

Since Discovery House had refused Harriet a hearing, she claimed that her due process rights had been violated. She asserted that the written contract granted her a property interest, entitling her to due process prior to termination. The Supreme Court refused to go along, saying she had shown no "independent source" that would establish a property interest. Finally, on the issue of breach of the covenant of good faith and fair dealing, the Court held that Discovery House had made several efforts to resolve the situation fairly with Harriet Malloy, but she had refused to cooperate. Her refusal to return to work constituted a "legitimate business reason" for discharging her.

Riley v. Warm Springs State Hospital, et al. (1987)

Michael Riley worked for two months as a psychiatric aide at Warm Springs State Hospital. In July, 1979, he was discharged while still on probationary status. The hospital claimed the reasons for termination were excessive absenteeism and sleeping on the job. Riley attempted to file a grievance through the union that represented him, but was told that the time period for grieving the dismissal had expired. He did, however, receive a meeting of himself, management, and union representatives. The hospital restated its reasons for termination and presented its supporting evidence. The union representatives agreed that the termination was justified. Riley's discharge was made final.

Riley filed suit in March, 1980, and the case came to trial in February, 1986. The jury found for Riley and entered separate awards of $18,343 each against the hospital and the union. The jury based it verdict on a breach of the covenant of good faith and fair dealing, even though the discharge occurred in 1979, and the covenant was first recognized by the Montana Supreme Court in 1982. The hospital appealed.

Actually, two cases came under consideration: 1) the *Gates* case, which established the covenant of good faith and fair dealing, and 2) the *Brinkman* case, which barred a claim of breach of the covenant when plaintiff was covered by a collective bargaining agreement. The hospital objected to retroactive application of the covenant, and Riley objected to the possible retroactive application of the *Brinkman* principle.

The Supreme Court discussed nonretroactive application of a decision, saying three conditions must be met: 1) the decision establishes a new principle of law by overruling precedent or by deciding an issue with a result "not clearly foreshadowed"; 2) the new rule must be examined to see if retroactive application will "further or retard" its operation; 3) the court must consider the "equity of retroactive application."

In reaching its decision, the court stated, "Although it can be argued that both *Gates* and *Brinkman* established new principles of law, it can also be argued that both principles were clearly foreshadowed." On the second condition, the court said, "[R]etroactive application will further the operation and purpose of the rules set out in both *Gates* and *Brinkman*. " On the third condition, the court cited that both Gates and Brinkman were terminated before their respective lawsuits resulted in the new principles of law. "We conclude that to have retroactively applied the rules in the two previous cases and not to apply them in this case would be clearly inequitable."

The court concluded its decision by saying the covenenant of good faith and fair dealing did apply retroactively, except that Riley's claim was barred by a retroactive application of the Brinkman principle. The jury award to Riley was overturned.

Stark v. The Circle K Corporation (1988)

A unique aspect of this case revolved around the company's use of an "at-will clause" on its employment application form. The Court rejected this tactic as a way of absolving the employer from its obligation under the covenant of good faith and fair dealing and noted the employer still would need to show "a fair and honest reason" for the termination in order to successfully defend it.

Circle K hired Greg Stark in Butte in December, 1981. The company's application contained an "at-will clause," which stated, "subsequent to being employed, I may be dismissed with or without cause." Stark apparently performed well with Circle K, receiving several promotions and raises. By November, 1983, he was zone manager, in charge of eight stores.

Throughout Stark's employment, he received regular evaluations. He consistently received "very good" to "superior" ratings, and the district manager rated him the best zone manager. However, the blossom wilted. The district manager became concerned about inventory shortages in the district, and he specifically addressed severe shortages at three of Stark's stores. In August, 1984, he met with Stark and presented him with a written "Employee Counseling Report" that cited the inventory shortages and placed Stark on a 30-day probation. Stark refused to sign the report, saying other zone managers had shortages but were not receiving the same treatment.

A few days later, Stark attended a regular managers' meeting, but no mention was made of the inventory problems. On August 22, the district manager again met with Stark and presented the counseling report for Stark to sign. Stark again refused and was fired for insubordination in his refusal to accept responsibility for the inventory shortage.

At trial in the subsequent lawsuit, several factual discrepancies surfaced. The district manager said he had not preplanned Stark's termination, yet he had come to the meeting with Stark's final paycheck and had brought along another manager to drive Stark's company vehicle back to Great Falls. The amount of inventory shortage came into question. The district manager had told Stark he would look into the inventory figures, but he never did. Stark rechecked the figures and found inaccuracies; the evidence at trial supported his position. The district manager also appeared not to have followed the Circle K progressive disciplinary policy. In addition, the district manager testified that an employee does not have the right to refuse to sign a counseling report; Stark, the company's personnel expert, and a higher company manager all testified that company policy allowed such refusal. Evidence at trial also confirmed Stark's allegations that other zone managers in the same district had significant inventory shortages without receiving discipline. In its verdict, the trial jury said the company had breached the covenant of good faith and fair dealing and awarded Stark $200,000 compensatory damages and $70,000 punitive damages.

Circle K moved for a judgment notwithstanding the verdict and for a new trial. The district court denied both motions, the company appealed. The company complained that insufficient evidence was present to support the breach of covenant finding. Thus, the motion for judgment n.o.v. was improperly denied. The Supreme Court disagreed, saying, "A court will not substitute its judgment for that of the jury. Evidence may be inherently weak and still be sufficient to uphold a jury verdict."

Circle K also contended that the at-will clause on its employment application was a contractual provision that precluded a breach of the covenant. The Court countered that the covenant "is implied as a matter of law based on the public policy of this State. It does not depend on contractual terms for its existence, nor is [it] subject to contractual waiver, express or implied." In addition, the Court said that several "objective manifestations" existed that established the covenant between Circle K and Stark.

Circle K argued, in the alternative, that it did have good cause to fire Stark. It claimed that good cause should be determined by the employer and not be subject to review by a jury. The Court disagreed, describing the covenant as "designed to prevent the abuses of unfettered discretion inherent in a situation of unequal bargaining power. An employee is not required to leap at his master's every command." On the main issue of termination, the Court said, "We will not require an employee to sign a written statement he believes to be false so that an employer can later justify termination."

"To rebut Stark's allegation," the Court continued, "Circle K need only have shown a fair and honest reason for termination. Circle K apparently failed to do so, however. Contrary to Circle K's assertion, the jury, as the trier of fact, does determine whether good cause existed." In examining the record, the Court noted that the district manager "was impeached on several matters, that his testimony conflicted with prior testimony given at an unemployment compensation hearing, and that his testimony conflicted with the documentary evidence." Coupling this with the fact that "[t]he jury

as trier of fact, determines the credibility of a witness and the reason for termination," the Court concluded, "[T]here is sufficient credible evidence to support the jury verdict."

Other issues of appeal concerned the amount of damages and method of determining them. In addition, Circle K claimed that an absence of proof ruled out the punitive damages awarded Stark. The court cited the Flanigan case as precedent and said, "The apparent lack of candor on the part of [the district manager] is sufficient for the jury to have inferred malice." In sum, the Supreme Court affirmed every issue on appeal from the District Court.

Nasi v. State Department of Highways (1988)

Larry Nasi began working for the Department of Highways (DOH) at Townsend in February, 1979. In June, 1982, the employment ended. Nasi claimed he was fired; DOH claimed he voluntaritly quit. In March, 1984, Nasi filed a grievance with the state Board of Personnel Appeals (BPA). In April, 1984, he filed a tort action against DOH in District Court. The court stayed this lawsuit until the BPA grievance was complete.

Nasi's BPA grievance proceeded from preliminary findings through a full hearing to a judicial review. He lost at every step; the finding was that he had voluntarily quit. Nasi did not appeal the judicial review from District Court. In August, 1986, District Court lifted the stay on Nasi's tort action, and in June, 1987, the court granted summary judgement to DOH on the grounds that the matter was *res judicata.*

Res judicata is a legal doctrine of judical finality: "a party should not be able to relitigate a matter he of she has already had an opportunity to litigate. This policy reflects the notion that a lawsuit should not only bring justice to the aggrieved parties but provide a final resolution of the controversy."

On Nasi's appeal of the summary judgement, the Supreme Court held that *res judicata* had been correctly applied: "*Res judicata* applies when administrative proceedings possess a judicial character." The BPA grievance, resulting in a full evidentiary hearing, was judicial in character and under the law. Since Nasi's lawsuit and grievance both involved the same issues and facts, the Court would "not allow Nasi to relitigate his grievance in a tort action raising the same issue previously litigated."

Meyers v. Department of Agriculture (1988)

William Meyers worked for two months as a potato inspector for the Department of Agriculture. After his termination, he filed a grievance with the department; he received $671 as a result of a grievance panel recommendation in his favor. He also received $184 in unemployment benefits.

Meyers was dissatisfied with the grievance outcome and filed suit. The case came to trial, and the jury awarded him $850 in damages. The District Court offset the award by the $671 he had already received from the department and $179 of the sum he had collected in unemployment. Meyers appealed on three issues: 1) the offset, 2) a partial summary judgement before trial that precluded an award of wages he might have earned, and 3) an attempt to recover penalties, court costs, and attorney fees. He lost on all three issues.

On the first issue, the Supreme Court relied on the District Court's statement that Meyers and the Department had agreed to the offset prior to the trial. Meyers did not refute this statement. On the second issue, Meyers relied on three statutes regarding payment of wages (39-3-204 – 206, MCA). However, the Court ruled, based on the *Como* case (above), that the laws apply to wages already earned and owed to the employee at the time of termination, not to wages that might have been earned had the termination not taken place. On the third issue, Meyers sought penalties and other costs under the same statutes (39-3-204 – 206, MCA). This issue was already decided, and the Court disagreed with Meyers that there were any other grounds for awarding penalties and costs.

Janz v. Quenzer, d/b/a Ben Franklin Store (1988)

Alma Janz and her daughter, Roxanne, worked at the Ben Franklin store in Baker. The owner was in the process of selling the store to Duane Quenzer, who told Janz he planned to keep her on as an employee when he became owner. Prior to the sale being final, the seller and buyer agreed to take inventory to establish its value. Janz helped take inventory, under the employ of the seller. On

November 4, 1983, inventory was completed or near completion, and Alma and Roxanne showed up for work. Quenzer told Roxanne she couldn't wear jeans to work. An argument ensued, and the two women walked out. Quenzer asked Alma Janz for her keys to the store; she refused, saying they belonged to the seller.

Alma Janz sued for wrongful discharge, alleging breach of public policy, of an express contract for employment, and of the covenant of good faith and fair dealing. District Court granted summary judgement for Quenzer on the grounds that he did not own the store and did not employ Janz at the time she walked out. On appeal, the Supreme Court noted, "The resolution of this issue depends on the existence of a material question of fact on whether Quenzer employed or contracted to employ Janz," since a material question of fact would preclude summary judgement and send the case to trial. The Supreme Court agreed with District Court that "no reasonable inference may be drawn that either the contract or the [employment] relationship existed."

Although Janz made several points to show that Quenzer was in control of the store and employed her, the Court rejected each of them in favor of four undisputed points asserted by Quenzer: 1) he did not yet own the store the morning of November 4, 1983; 2) the seller paid Janz's wages through November 3, 1983; 3) a Ben Franklin franchise representative was in control of the store during inventory, and 4) Janz refused to give Quenzer the keys, saying they belonged to the seller.

Bieber v. Broadwater County and Duede (1988)

This case further defined the immunity from lawsuit provided to legislative bodies by §2-9-111, MCA (see *Barnes* case above). James Bieber worked for the Broadwater County road crew, starting as a part-time employee in September, 1983, and moving to full-time in April, 1984. William Duede was a county commissioner who supervised the road crew — assigning work, hiring, and firing. In February, 1986, Duede fired Bieber for abusing county road equipment. He did not consult with the other commissioners before taking the action, but later told them what had happened. They concurred with his action.

Bieber sued the county and Duede for wrongful discharge. District Court granted summary judgement in favor of the defendants on the basis that they were immune from lawsuit under the statute. On appeal, Bieber argued that the law covers purely "legislative" acts and excludes day-to-day "administrative" acts, such as Duede's management of the road crew. The Supreme Court refused to recognize the difference "because the plain language of the statute makes no such distinction." Bieber secondly contended that Duede, in firing Bieber, was not discharging an official duty associated with "the introduction or consideration of legislation or action" by the county commissioners. The Court said "Duede clearly had an official duty to oversee and administer the maintenance and repair of county roads ... In firing Bieber, Duede was discharging his lawful duty as commissioner. He cannot be sued for that action under the current law."

Finally, Bieber challenged the constitutionality of §2-9-111 on the basis of equal protection and access to the courts. The Montana Constitution guarantees citizens access to the courts for redress of wrongs done to them. The Supreme Court stated, "[A]ccess to the courts is not an independent fundamental right." Since a fundamental right is not involved, the Court need only find a rational basis for the law that excludes some employees from suing. The Court held that the reason for legislative immunity "is to insulate a decision or law-making body from suit in order to prevent its decision- or law-making processes from being hampered or influenced by frivolous lawsuits. This reason satisfies the rational basis test." Thus, the Court affirmed summary judgement against Bieber.

Frigon v. Morrison-Maierle, Inc., Enright, and Larsen (1988)

Morrison-Mairle is a consulting engineer firm with headquarters in Helena. This dispute arose in its Billings office. Lorraine Frigon began working as a part-time secretary in January, 1984. Morrison-Maierle gave her a handbook, which explained, in part, that employees receive annual performance reviews and salary reviews. Frigon was informed she would receive her first reviews after six months. In July, 1984, Bill Enright told Frigon she was due a merit raise, but he didn't have time to do a performance review. In October, 1984, Frigon asked for and received a performance review from Larry Larsen. A month later, Philip Green became Frigon's supervisor. Frigon asked for an annual performance review in January, 1985, but there was no record it took place.

In July, 1985, Green gave Frigon a performance review; he told her he had recommended a merit raise, but the head office had turned it down on the basis of negative comments from Enright and

Larsen. Frigon asked that they put their comments in writing. Reluctantly, they did so. Over the course of a few days, Frigon prepared a written response to the comments, gave it to Green, and resigned. Five months later, she filed suit, alleging breach of the covenant of good faith and fair dealing, constructive discharge, slander, and negligent or intentional infliction of emotional distress. District Court granted summary judgement in favor of the defendants, and Frigon appealed.

Although Frigon was not fired, she said the defendants had breached the covenant of good faith and fair dealing by refusing to give her performance and salary reviews, as stipulated in policy, and by denying the merit raise on the basis of negative and partially false comments. The Supreme Court didn't buy her argument: "Breach of the covenant of good faith and fair dealing was established as a tort separate from wrongful discharge, but applicable only in cases of employee termination." Since Frigon voluntarily resigned, she had no grounds for breach of the covenant. Had Frigon been able to make a case for constructive discharge, as she alleged, she might have been able to show a breach. But the Court rejected her argument that constructive discharge might have occurred: "Even assuming that [Frigon] correctly states the test for constructive discharge in Montana, the facts do not support her argument."

Frigon also argued that oral and written comments by Enright and Larsen were defamatory. The Court examined the test for defamation and concluded that "there is no evidence to support a holding that [their comments] disgraced or degraded [Frigon] as a matter of law." "Furthermore, a basic tenet of the law of defamation is that an expression of opinion is generally not actionable. ... The facts relied on by [Frigon] to show defamation instead reflect opinions rendered in the context of the evaluation of her performance on the job."

The final issue involved emotional distress. First, the Court pointed out that "[e]motional distress under Montana law has been and remains primarily and element of damages rather than a distinct cause of action." However, the Court examined Frigon's arguments and concluded, "There is no evidence in the record ... which would support a claim for intentional infliction of emotional distress. The comments made by Enright and Larsen, and the failure of Morrison-Maierle to give [Frigon] a raise are hardly instances of conduct that goes 'beyond all possible bounds of decency.' Nor has [Frigon] presented facts showing a substantial invasion of her legally protected interests. The law has yet to protect a person's interest in receiving a merit raise."

The Court affirmed summary judgement. So, not only did Frigon "lose the lawsuit," she also had to abide by a part of the judgement that required her to pay the costs of litigation (up to summary judgement) to Morrison-Maierle.

Oedewaldt v. J.C. Penny Company, Inc. (1988, federal)

This is a Memorandum and Order from Federal District Court regarding a lawsuit filed by Gisela Oedewaldt against J.C. Penney Co. The court ruled on summary judgement requested by Penney on two main issues: workers' compensation exclusivity and constructive discharge.

Oedewaldt worked at the Penney store in Shelby. She alleged that, beginning in 1974, the manager, Kenneth Pitcock, engaged in actions toward her that eventually led to her nervous breakdown and loss of her job in 1985. Normally, when a worker is injured at work due to negligence or accident, workers' compensation is the exclusive remedy for compensation; "common law damages are not available for injuries negligently or accidentally inflicted by an employer." The court granted summary judgement in favor of Penney for claims based on negligence.

However, Oedewaldt also alleged *intentional* conduct by the manager caused her injury. If proven, such conduct — and the resulting injuries — would not fall under workers' compensation. The court granted Oedewaldt the opportunity to amend her claim to include intentional infliction of emotional distress, with the facts to be decided at trial.

Oedewaldt also alleged wrongful discharge and breach of the covenant of good faith and fair dealing. Penney argued that no discharge or forced resignation occurred, so her claims must fail. Oedewaldt countered that she was "constructively discharged" as a result of Pitcock's actions. The court stated, "Constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. To find constructive discharge, the court determines whether or not a reasonable person in the employee's position and circumstances would have felt compelled to resign."

"No decision of the Montana Supreme Court expressly states that Montana recognizes the concept of 'constructive discharge,'" the court continued. However, the court acknowledged that the Montana

Supreme Court had "discussed" the issue in at least one previous case. The federal court's conclusion was "that if presented with the question at issue here, assuming the truth of [Oedewaldt's] factual allegations, the Montana Supreme Court would undoubtedly hold the concept of 'constructive discharge' applicable to her action ..." So the court denied summary judgement on the issue of wrongful discharge and breach of the covenant of good faith and fair dealing, sending the case to trial.

Rupnow v. City of Polson (1988)

This appeal contested a summary judgement upholding the discharge of a probationary police officer in Polson. William Rupnow began work as police officer in July, 1985. He was to be on probation for at least one year. His supervisor, Ronald Buzzard, told Rupnow that the probationary period "shouldn't be a problem for him," in light of Rupnow's past experience. In September, 1985, Rupnow received a satisfactory performance evaluation. In January, 1986, he received a second evaluation, which noted some areas needing improvement. Rupnow refused to sign the second evaluation and filed a protest with the mayor. In March, 1986, the City fired Rupnow, stating the reasons to him in a meeting and following up with a letter.

Rupnow sued, alleging wrongful discharge, breach of the covenant of good faith and fair dealing, and negligence. District Court granted summary judgement to the City, and Rupnow appealed.

On the allegation of wrongful discharge, the Supreme Court said, "To successfully maintain the tort of wrongful discharge, a plaintiff must show that the defendant violated a public policy." Rupnow asserted that the city did not follow its progressive discipline policy: 1) oral warning, 2) written warning, 3) suspension, and 4) dismissal. The Court noted that the same policy states, "It should also be understood that, depending on the nature and circumstances of the violation, the authority in charge may use any disciplinary measure appropriate within their judgement." The City maintained that it used alternative measures, allowed under policy, through oral warnings and written evaluations. The Court agreed and upheld summary judgement on the public policy claim.

With regard to the covenant of good faith and fair dealing, the Court acknowledged it existed for probationary employees (see *Crenshaw*, above), provided the employee could show "objective manifestations" of job security. Rupnow said that the two evaluations and Buzzard's statement that the probationary period shouldn't be a problem for Rupnow established objective manifestations. The Court disagreed, saying that these events did not establish job security. Rupnow also said failure to follow the progressive discipline policy breached the covenant, but the Court had already disposed of that argument. Finally, Rupnow disputed that he had been warned that his probationary status was in jeopardy While the Court acknowledged that this was a factual dispute, it said, "Oral warnings that an employee's probationary status is in jeopardy are not mandatory." Considering all the evidence, the absence of the warnings, if true, would still not bar summary judgement.

Finally, Rupnow's negligence claim was based in part on the City's failure to follow the progressive discipline policy. Irrelevant, said the Court, as the issue was already decided. Rupnow also said Buzzard was negligent in failing to adequately investigate certain allegations against Rupnow. The Court concluded, "Chief Buzzard obviously did not conduct an investigation to Rupnow's satisfaction; however, Rupnow does not bring forth evidence to raise a genuine issue of material fact that Buzzard was negligent in his investigation." The Supreme Court affirmed the summary judgement in toto.

Barrett v. ASARCO Incorporated (1988)

This is a complex case that, at this writing, is not yet complete, as the Supreme Court ordered a new trial. At issue was what evidence and testimony may be allowed to establish the "character" of the discharged employee. In addition, the Court expanded its interpretation of the covenant of good faith and fair dealing, saying that the obligation is binding on the employee as well as the employer.

Robert Barrett worked for ASARCO for 15 years, 10 of those as a foreman. In November, 1983, he injured his back at work. While Barrett was on leave for his injury, ASARCO paid his full salary and covered his medical expenses. He never returned to work. In May, 1984, ASARCO confronted him with a report that he had been seen unloading hay bales while still on disability leave. Barrett denied it, and ASARCO fired him for lying about his physical activities. A year later, Barrett filed suit, alleging breach of the covenant of good faith and fair dealing.

Prior to trial, but shortly after the deadline for completion of discovery, ASARCO learned the names of six witnesses who might have had information about other incidents of Barrett's dishonesty

during his employment. After a series of legal maneuvers and shortly after the trial began, District Court ruled to exclude this evidence. The jury returned a verdict in Barrett's favor, awarding $338,000 in compensatory damages and $75,000 in punitive damages.

A week after the end of a trial, a woman contacted ASARCO, claiming to have information that contradicted the verdict. The woman's name had come up during discovery, but Barrett had omitted her name as a person with knowledge relevant to the case. She met with ASARCO and signed a statement about a conversation and activities Barrett engaged in while on disability leave. Armed with this new information, ASARCO moved for a new trial. District Court denied the motion, and ASARCO appealed on the basis of both the prior excluded evidence and the new information.

The Supreme Court addressed each of the reasons that District Court had excluded evidence at the beginning of the trial. A number of legal issues came into play; in a nutshell, the Supreme Court held that the District Court should not have excluded the evidence. The Court said the nature of the excluded testimony "directly pertains to the issue of Barrett's honesty with his employer" and is "thus relevant to ASARCO's defense that it terminated Barrett for dishonesty."

In the *Flanigan* case (above), the Court had ruled that evidence acquired after termination may not serve as additional reasons for the termination. In this case, though, the Court said, "After-acquired evidence, however, may be introduced if relevant to the character of a party when that character is an essential element of the defendant's original defense." The Court reasoned that ASARCO did not seek to introduce the evidence as additional reasons justifying termination, but as evidence of Barrett's character that strengthens ASARCO's defense that Barrett lied about his hay-lifting activities.

"Further," the Court said, "alleged evidence of previous incidents of dishonesty would be relevant to the issue of whether an employee has a reasonable expectation of job security and thus may claim the protection of the implied covenant of good faith and fair dealing." Emphasizing that "the covenant of good faith and fair dealing mandates a reciprocal duty," the Court said, "an employee who breaches his or her duty of good faith and fair dealing may not then complain of unfair dealing by the employer." Therefore, "Barrett cannot claim that ASARCO's alleged sudden, 'underhanded' termination decision was a breach of the covenant of good faith and fair dealing if Barrett himself failed to deal honestly in his job performance with ASARCO." Consequently, evidence of Barrett's alleged misconduct "is relevant to a determination of whether Barrett dealt with ASARCO in good faith."

Having thus disposed of the case and remanded it for a new trial, the Court declined to discuss the issue of the evidence that came to light after the first trial.

Bestwina v. Village Bank and Richard Olson (1989)

This case revolved around circumstances for "tolling" (suspending) the statute of limitations for a claim. Lawrence Bestwina worked as vice-president at the Village Bank in Great Falls. In March, 1977, he began psychiatric treatment for depression. In November, 1977, he was discharged from his job. A couple months later, he was hospitalized for depression, and his condition continued to deteriorate.

A wrongful discharge claim was filed in October, 1985, with Bestwina's wife acting as guardian. The suit was filed nearly eight years after the discharge, and the statute of limitations for tort claims is three years. The defendants moved for summary judgement, saying the statute of limitations had run and the suit was untimely filed. Bestwina said the statute of limitations should be tolled for the period of his mental illness. In addition, Bestwina claimed that the defendants fraudulently concealed the real reason for the termination until October, 1983; therefore, the statute of limitations would not have begun until then. District Court granted the defendants' motions for summary judgement.

In considering Bestwina's appeal, the Supreme Court pointed out that a disability, such as mental illness, may toll the statute of limitations. Defendants had contended that Bestwina had pursued social security benefits and workers' compensation during the time of his "disability," and these actions served to show his competence. The Court said, "While we recognize that Mr. Bestwina's pursuit of these claims is certainly proper for consideration on the issue of mental illness, we conclude that the pursuit of the claims does not conclusively establish an absence of serious mental illness." Given all the evidence on record, the Court concluded that "there is a material issue of fact precluding summary judgement." The District Court was instructed to determine the periods of Bestwina's disability, and "the total of such time shall not be counted" within the statute of limitations.

On the issue of fraudulent concealment, Bestwina pointed out that Richard Olson underwent deposition in 1983. It was only at that time that Olson stated that Bestwina had, in fact, been fired because of a personal matter between the two men. Bestwina wanted the Court to agree that the statute of limitations on fraudulent concealment commenced when Olson made his deposition. The Court refused to extend the "discovery doctrine" to cover this case. That claim was thus excluded from further proceedings.

Mahan v. Farmer's Union Central Exchange, d/b/a Cenex (1989)

This appeal concerned a number of legal issues involving selection of jurors and admission of evidence and testimony. The outcome was a four–three decision, reversing and remanding for a new trial.

Wayne Mahan worked for Cenex for 30 years. By February, 1983, he was head development engineer at the firm's refinery in Laurel. At that time, his employment was terminated in what Cenex called a reduction in force. He was then 60 years old. Mahan complained to the Montana Human Rights Commission of age discrimination by Cenex. The HRC investigated the case and made a preliminary report in August, 1984. By October, 1984, the case had been pending before the HRC for over a year, and at Cenex's request, the HRC issued a "right to sue" letter. Mahan then filed suit, adding breach of the covenant of good faith and fair dealing to his age discrimination claim.

During jury selection, Mahan's lawyer challenged two jurors "for cause." Both challenges were denied by the District Court judge. The lawyer then had to use all his preemptory challenges to exclude the two jurors when, in fact, he would have used them against other selected jurors. Upon examination of the transcript, the Supreme Court held that the District Court had erred in denying the challenges for cause. Thus, it ordered a new trial.

The Court dealt with several other issues as well. At trial, both sides used statisticians to debate the claim of age discrimination. The Court emphasized that these experts, on re-trial, could testify only "that their statistical test show or do not show patterns of discrimination based on age, but may not testify to the ultimate conclusion that age discrimination" occurred in Mahan's termination.

During the first trial, Mahan had claimed that the company retaliated against him for suing; it refused to provide a letter of reference and did not include him in company and employee functions. (The HRC investigation had also indicated that Cenex had refused severance pay after Mahan filed his complaint.) The Court noted that such retaliation for filing a complaint with the HRC is prohibited by law. Further, the retaliation "might possibly be considered evidence of bad faith in the original termination as well as in the retaliation. [Mahan] was therefore entitled to instructions to the jury based on his claim of retaliation."

The Court examined other issues of admissable testimony. Primary among these was its agreement with District Court that the HRC compliance officer could not be allowed to testify about his investigation of Mahan's discrimination complaint. District Court had also excluded the HRC's written report of "reasonable cause." The Court examined both the federal and Montana rules of evidence and concluded, "The very investigation information that the federal rule allows is specifically excluded in the Montana rule." This holding prompted a detailed dissent by Justice Sheehy, who thought that either the report or the testimony (or both) should be allowed as "an aid to the jury."

On one other issue, the Supreme Court affirmed District Court's action in excluding evidence offered by Mahan regarding the Cenex's management (or mismanagement) of the refinery. However, the Court did agree that Cenex could offer evidence of the need for its cost containment program that led to the reduction in force affecting Mahan.

Prout v. Sears, Roebuck and Company and Terry McGinnis (1989)

Tammy Prout began working for the Helena Sears store at the age of 16 in 1979. Her employment application contained the following statement, in part: "[M]y employment and compensation can be terminated with or without notice, at any time, at the option of either the company or myself." She also signed a personal record card that stated, "In consideration of my employment, I agree to conform to the rules of Sears, Roebuck & Co. and my employment and compensation can be terminated, with or without cause and with or without notice, at any time, at the option of either the company or myself."

After two years, Prout received a promotion and a raise. In January, 1983, she became a supervisor and received a large raise. The company agreed that Prout was promoted "because her supervisors

were generally satisfied with her job performance." During Prout's seven and one-half years with Sears, the store changed managers five times. At least three of the managers gave Prout evaluations that noted problems with absenteeism and tardiness. In December, 1986, the then-manager, Terry McGinnis, fired Prout for falsification of two payroll time sheets.

Under Sears's payroll system, employees were to report their hours for the full week every Thursday. If an employee were scheduled to work Friday and/or Saturday, he or she would report those hours, even though they hadn't yet taken place. If those hours were not worked, the employee was supposed to teletype corrections to the central payroll office. Prout and two other employees said it was acceptable practice under two prior managers to forego the teletyped corrections and, instead, "make up" the reported hours as compensatory time the next week. McGinnis and other employees disputed this. The weekly time sheets contained the statement, "I have recorded by actual starting and quitting time each day. Any falsification will subject me to immediate dismissal."

Prout filed suit against Sears and McGinnis. Plaintiff and defendants agreed that several issues were to be litigated at trial. However, the defendants moved for summary judgement, and District Court granted it, saying,

> "The sole issue decided by the Court is that plaintiff's claims are precluded as a matter of law by the language of the plaintiff's employment application and her personal record card. That language in clear and unequivocal terms notified plaintiff that her employment could be terminated at any time and for any reason, and defeats the claims plaintiff is attempting to assert in this case."

Prout appealed to the Supreme Court. The result was a lengthy opinion that reversed summary judgement. The Court examined the tort exceptions to at-will employment in Montana and noted that Prout's discharge preceded enactment of the wrongful discharge statute. In this case, the Court said, the parties signed a pretrial order "listing what the parties considered eight issues of fact remaining to be litigated." The Court concluded, "These must be resolved to determine whether [Prout's] claims fall into any of the four exceptions to the right of the at-will employer to discharge its employees. This precludes summary judgement."

"At the same time," the Court continued, "we give effect to the employment application and record card. These give the employer the right to fire without cause. They do not give the employer the right to fire for a false cause. If the at-will employer who can fire without cause ... chooses instead to fire an employee for dishonesty, the discharged employee must be given the opportunity to prove the charge of dishonesty false."

Justice Weber filed a lengthy dissent in this case. Besides offering a history of the at-will doctrine, he cited to a 1988 landmark case in California (*Foley v. Interactive Data Corp.*). In essence, the California decision barred punitive damages for breach of the covenant of good faith and fair dealing, saying that the breach should be dealt with only in the context of contract damages. Weber noted that Montana may be the only state that allows breach of the covenant as a distinct tort, but concluded that breach of the covenant "allows recovery only of contract damages and that punitive damages are not recoverable." In Prout's case, Weber would agree with the District Court's conclusion that the specific language of her "contract" with Sears precluded any claims by Prout in the absence of a violation of public policy.

Niles v. Big Sky Eyewear, a/k/a Professional Eyecare, Vainio, and Vanio (1989)

The defendants in this case include a professional corporation and two brothers, Leonard and David Vainio, who are partners in the corporation. They will be referred to as "Big Sky." Janice Niles began working in Big Sky's Bozeman store in November, 1984. By April, 1986, she had received several raises and was manager of the store. Sometime that month, Niles fell under suspicion of taking money from the till, based on a supposed allegation by another employee. Two corporation officers went to the police, who attempted a "sting," purchasing an item at the store with marked bills. Based on what the officers saw and what they had been told, they arrested Niles that day for misdemeanor theft.

After her arrest, Niles did not return to work at the store. Leonard Vainio promoted his girlfriend to manager. The misdemeanor charges were dropped when Big Sky failed to provide the records to support prosecution. Niles had to go to a great deal of trouble to secure her final paycheck from Big Sky. She sued for defamation, negligent infliction of emotional stress, wrongful termination, and breach of the covenant of good faith and fair dealing.

At trial, several former Big Sky employees testified that Niles was a good and respected employee. Testimony also indicated that Big Sky was shoddy and haphazard in handling money and keeping books. The employee who supposedly had fingered Niles emphatically denied that she had ever reported her to L. Vainio. Niles presented evidence of emotional and economic suffering resulting from the ordeal. The jury returned a verdict in her favor and awarded $470,000. Following the verdict, both sides appealed on several issues. We will discuss only a few.

The defamation claim in Niles's suit was based on Big Sky's report to the police. Big Sky asserted that the claim should not have been allowed, as a qualified privilege exists for a statement made by an employer about an employee for the protection of a lawful business. The Supreme Court pointed out that "the qualified privilege is waived if it is abused." Substantial evidence on the record indicated that L. Vainio had made his "statements without good faith," thus negating the qualified privilege.

Big Sky also claimed that Niles's claim of wrongful termination didn't hold water: she had not been fired. The Supreme Court said that "a doctrine of constructive discharge has been recognized in Montana." Based on that doctrine, the Court said, "No speculation is required for the jury to conclude that when an employer causes the arrest of his employee ... that the employee has been constructively fired. It defies human experience to believe that Niles would reappear for work the next workday following her arrest."

Another issue on appeal was "comparable employment." It referred to Big Sky's offer to re-employ Niles; District Court excluded that offer from evidence. Rather than standing as evidence that would aid in Big Sky's defense, the offer was part of "compromise negotiations" — an attempt by Big Sky to stave off litigation. The fact that the offer was made after Big Sky had already received a draft of the complaint — although before the suit was filed — led to that conclusion by the Court.

Finally, Big Sky appealed Niles's claim negligent infliction of emotional distress. The Supreme Court said, "Where there is evidence of substantial invasion of a legally protected interest which causes a significant impact upon the person of the plaintiff, emotional distress is compensable without showing of physical or mental injury." In summary, the Court upheld the trial verdict on all issues.

Hobbs v. Pacific Hide and Fur Depot (1989)

This is another case the Supreme Court sent back for retrial after finding errors in the original trial. Here, the errors centered once again on the nature of the implied covenant of good faith and fair dealing.

In the fall of 1978, Roger Palmer interviewed Clifford Hobbs for a job with Pacific Hide and Fur. According to Hobbs, Palmer painted a glowing picture, saying Hobbs would have a bright future and job security with Pacific. These statements, along with other promises, induced Hobbs to move from Denver to Great Falls to become Pacific's director of corporate purchasing in December, 1978.

Unfortunately, Palmer and Hobbs did not get along well. Still, Hobbs was promoted in August, 1980, overseeing a branch of Pacific while still running purchasing. Apparently, though, his pay was less than that of other branch managers. And while other managers reported to the president or vice president of Pacific, Hobbs had to report to Palmer, who continued to be disruptive. At one point, Palmer was disciplined and removed as Hobbs's supervisor, but became his supervisor again a few months later. Other managers reported having trouble with Palmer.

In April, 1981, the branch management duties were taken from Hobbs; he still directed purchasing, under Palmer's supervision. In September, 1981, Pacific fired Hobbs without prior notice. At that time, Pacific's president circulated a letter to other managers saying Hobbs had not worked out as branch manager but had done an excellent job in purchasing. The letter went on to say that the conflicts between Hobbs and Palmer "should now be resolved." Eight months later, Pacific fired Palmer, apparently because of unresolved conflicts with other managers.

Hobbs sued, claiming actual fraud, constructive fraud, breach of the implied covenant of good faith and fair dealing, and negligent misrepresentation. The case went to trial in 1984, and the jury found against Hobbs on all claims. He appealed on four issues, and the Supreme Court granted a reversal on one of the four issues and partially agreed with Hobbs on one other issue.

The reversal focused on the instructions the District Judge gave to the jury relating to the covenant of good faith and fair dealing. The Court said the instructions were "inadequate, confusing and mis-

leading." The Court reviewed its past pronouncements on the covenant and studied the two instructions given by the District Court. "Taken together, the court's instructions failed to tell the jury the nature and extent of the implie covenant of good faith and fair dealing." The Court then offered a suggested instruction regarding the covenant; the concluding paragraphs of these instructions would state:

> "In determing whether the defendant violated the duty of good faith and fair dealing, you must balance the interest of the defendant in controlling its work force with the interest of the plaintiff in job security. ...
>
> "Thus, if the employer is motivated to discharge the employee for reasons unfair or not honest, the employee is entitled to recover damages proximately caused by the breach. On the other hand, if the employer was motivated by honest business reasons in discharging the employee, the employer had the right to terminate the employment ..."

Another issue dealt with information exchanged during discovery. Since one of the reasons Pacific gave to Hobbs regarding his dismissal was difficult economic times, Hobbs had requested income tax records of the company from 1979 through 1982. The Court agreed these records could be used as evidence. At trial, Hobbs's financial expert had been cross-examined by Pacific regarding information that apparently had not been made available during discovery. The court directed that "information that may be used by either party in direct or cross-examination of witnesses must be supplied in accordance with the request for production" during discovery.

Hobbs also contended that District Court had improperly instructed the jury on constructive fraud. However, the Supreme Court said Hobbs's "theory or basis for constructive fraud [was] not properly conceived in this case." Hobbs had cited statements made by Palmer during the employment interview that Pacific was a "gold mine" and the job was the "opportunity of a lifetime." The Court said, "Such statements are not the source of [Hobbs's] problems ... nor are they demonstrably false. The statements may arguably have given rise to justifiable expectations in Hobbs about his employment, but they do not constitute a basis for constructive fraud."

Justice Weber dissented. He delved into the record to review "substantial evidence to support the conclusion of the jury" that Hobbs should have been terminated. He also said the instructions to the jury on the covenant were "a fair statement of the law as it existed and was available to the trial judge and attorneys during the 1984 trial." Weber also noted that "almost 8 years have passed since the date of termination and 5 years since the trial. We are posing a difficult trial problem ... by the present reversal."

Gentry, Damon, and Gleich v. City of Helena and the Police Commission of the City of Helena (1989)

This case did not involve any tort claims relating to discharge; rather, it was a continuing "judicial review" of an administrative decision. The three plaintiffs were Helena police officers who had been charged with misconduct. Under statute, they had a hearing before the Helena Police Commission. The Commission imposed 90-day suspensions on Gentry and Damon and a 30-day suspension on Gleich. The Helena city manager modified the Commission's decision and fired all three.

The officers petitioned in District Court for judicial review of the actions. When District Court upheld the decision, they appealed to the Supreme Court. The Court determined that all the proceedings had gone according to statute, including the city manager's decision to modify the Police Commission's disclinary action. The Court then said that the principal issue on appeal was "whether substantial evidence supports the decision of the Police Commission as modified by the City Manager."

Under the law and previous decisions, the Court said, "[t]he findings of the Commission are final and conclusive is supported by substantial evidence." In addition, it is not up to the courts "to determine penalties, sanctions or disciplinary measures that may be taken against a police officer." The Court determined that "substantial evidence on the whole record does support the findings and conclusions of the Helena Police Commission, and the decision as modified by the City Manager."

With that out of the way, the Court addressed other issues raised by the plaintiffs. Most of the matters were technical in nature, and Court did not find reversible error in any aspect of how the case was handled or the hearing conducted. Final among the issues was the officers' contention that the discipline (discharge) was disproportionate to the misconduct. The Court simply said that such discipline was up to the Commission and city manager. "[T]hat kind of decision relating to the per-

sonnel of the city is beyond our reach and jurisdiction."

Peterson v. Great Falls School District No. 1 and A (1989)

With this decision, the Supreme Court reaffirmed and "expanded" its view of legislative immunity under §2-9-111, MCA (see *Barnes* and *Bieber*, above). The Court upheld District Court's summary judgement in favor of the school district because of legislative immunity.

Vicki Peterson worked as a custodian for the Great Falls school district. In May, 1984, she was fired. She alleged that the basis of her termination was her refusal to empty 55-gallon trash drums into a dumpster. According to Peterson, she had asked that her job duties be changed so she wouldn't have to empty the barrels. The District refused, telling her to get help in handling the containers. When she still refused to "manhandle" them, an administrative assistant fired her. Peterson contended in her complaint of wrongful discharge that requiring her to empty the barrels created an unsafe workplace and violated a Great Falls city ordinance banning the use of 55-gallon barrels for trash.

In her appeal, Peterson said the discharge was an administrative, rather than legislative, action and was thus not covered by the statutory immunity. The Court said, "While the title of the statute infers that the immunity granted is for legislative acts or omissions, the actual language employed in defining and granting the immunity is much broader." The Court agreed with District Court that "the action of the legislative body need not be legislative in order to afford immunity."

"The statute," continued the Court,"clearly extends immunity coverage to school districts, to the school boards governing those school districts and to agents of those school boards." Although an administrative assistant fired Peterson, he brought the decision before the board at its next meeting, and the board ratified the decision. The immunity also applies to actions by "agents" of the legislative body. Here, the Court said, the administrative assistant was the agent, and the action was ratified by the board.

Peterson also contended that the immunity statute violated her fundamental right to full legal redress under the Montana Constitution. The Court disposed of this argument under the precedent set in the *Bieber* case: "The statute has previously passed [the] rational relationship test and we find that Peterson's argument of unconstitutionality must fail."

Justice Sheehy dissented, saying the majority decision was "an incorrect reading of the statute." It was his opinion that "the intent of the legislature was to grant immunity for legislative action by a legislative body, and no more." In expanding his viewpoint, Sheehy said, "A body acts legislatively when it sets policy, or adopts regulations for the enforcement of its policies. Beyond that, the entity or its agents are acting administratively and should not come within the ambit of legislative immunity."

Sheehy also discussed the constitutional issue of access to the courts and full legal redress. He concluded, "It is enough to say here that in my view §2-9-111, MCA, carried to the extent decided by the majority in this case, violates Article II, Section 16 in every particular." Justice Hunt also dissented, saying "*Bieber* does not grant ... immunity to a member of the government who is not also engaged in legislative functions."

Keller v. School District No. 5 and its Board of Trustees, and Ed Argenbright (1989)

This case concerns judicial review of administrative proceedings, specifically regarding nonrenewal of a teacher's contract. It bears some relationship to the 1984 *Bridger Education Assoc.* case (above).

In April, 1987, Rose Keller was informed that her teaching contract would not be renewed for the next school year. The letter she received gave no reasons for the termination, but the school board minutes indicated that all the nontenured teachers had been terminated for financial reasons Keller relied on those minutes and did not request a specific statement of reasons, as allowed under statute (§20-4-206(3), MCA).

After the passage of a mill levy in June, 1987, the board voted to extend contracts to all the laid-off teachers, with the exception of Keller. In July, she appealed her termination to the County Superintendent of Schools. Her appeal was dismissed on the basis that it had not been filed within 30 days of the April notification on nonrenewal, as required by administrative rule. The State Superintendent of Public Instruction upheld this decision, but District Court reversed it.

When the Supreme Court reviewed the case, it noted simply that Keller had not requested the reasons for termination within 10 days of notification, nor had she appealed the nonrenewal within 30 days of notification. Keller claimed special circumstances merited an exception to these limitations. First, because of the resolution of the school board that "financial conditions" necessitated laying off nontenured teachers, she did not file a specific request for reasons. Anyway, the board need not have provided a response to such a request, as §20-4-205(4), MCA says that no reasons need be given "when the financial condition of the school district requires a reduction in the number of teachers ... and the reason for the termination is to reduce the number of teachers ..."

Secondly, Keller argued, she appealed the termination only after she was the sole teacher not rehired. The board's action indicated that its reasons had changed, and therefore, "financial conditions" was no longer applicable. The Court, however, stuck to the time limitations and reversed the District Court decision. "Even in those cases where 'financial conditions' is the alleged reason for termination, nontenured teachers cannot assume this is the reason for termination unless they request ... written confirmation of the reasons for termination."

Justice Hunt dissented, implying that Keller was the victim of a Catch-22. She lost because she didn't ask for reasons on time, but had she asked, the board need not have provided any. She relied on the school board's resolution as reported in the minutes; Hunt wrote, "If a teacher cannot rely on a resolution of the school board, what can she rely on?"

Thompson v. Board of Trustees of School District No. 2, Yellowstone County (1989)

In this case, the Supreme Court again undertook a review of administrative proceedings involving a teacher. The case follows a complex procedural path that began in March, 1983, when the school board voted not to renew Roger Thompson's contract as choir teacher at Billings West High School. The board notified Thompson by letter, which stated in part, "School District No. 2 would be better served by another teacher in this position."

Thompson responded with a letter requesting the specific reasons for termination and also requesting a hearing before the board. The board wrote back, saying its first letter "included the reasons for the termination ..." but granting an "appeal." After the appeal, the board voted again to terminate Thompson's employment. It never provided any additional reasons, either in writing or orally.

Thompson appealed to the County Superintendent, who dismissed the appeal as not being properly presented in accordance with administrative rules. Thompson took no further appeal. At the same time, though, he was pursuing a grievance under the union contract. His grievance did not contest the sufficiency of reasons given by the board. The grievance was denied at the first two levels. His next choice was to go to arbitration, but the union no longer backed him at this point. Thompson did not proceed with his grievance; instead, he filed a tort claim in District Court in June, 1983, alleging tort liability, violation of due process, and breach of the covenant of good faith and fair dealing.

In March, 1988, District Court granted partial summary judgement to both sides. Although legally complicated, the order in essence said Thompson had no claims against the school district except that it had to provide him with specific reasons for nonrenewal of his contract. Thompson appealed to the Supreme Court.

The Supreme Court held that Thompson's "own Grievance Report contradicts the basic assertion in [his lawsuit] where he complains that the notice was insufficient." Further, the Court said, "[w]e conclude that the grievance procedure ... is the binding method of disposing of the issues ..." Finally, "[b]ecause Mr. Thompson chose not to proceed to binding arbitration, that terminated any further rights with regard to the claimed grievance." The Court's concluded "[B]y failing to follow these contract provisions, Mr. Thompson has lost his right to obtain specific reasons for nonrenewal."

With regard to Thompson's tort claims against the district, the Court simply said, "As he failed to follow the appropriate administrative procedure, he is barred from making the same contentions" in his lawsuit. Thus, the Supreme Court affirmed summary judgement in favor of the district, and reversed the District Court's order that the school district had to provide specific reasons to Thompson.

Meech v. Hillhaven West, Inc., and Semingson (1989)

On June 29, 1989 — nearly two years after the Wrongful Discharge from Employment Act took effect

— the Montana Supreme Court upheld the constitutionality of the Act in all respects. This landmark decision by a 4–3 majority overruled three previous decisions in which the Court had developed its interpretation that Article II, §16, of the Montana Constitution guarantees a fundamental right to full legal redress.

The case came to the Supreme Court from Federal District Court in Great Falls. Russell Meech had filed an action in that court, seeking damages for wrongful termination, breach of the implied covenant of good faith and fair dealing, and intentional or negligent infliction of emotional distress. Hillhaven moved for a dismissal, saying that the Wrongful Discharge Act precluded Meech's claims. Meech responded by contending that the Act violated Article II, §16, of the Montana Constitution. The federal court then certified two questions to the Montana Supreme Court:

> 1) Is the Montana Wrongful Discharge from Employment Act unconstitutional in that it serves to wrongfully deprive an individual for his or her right to "full legal redress" within the meaning of Article II, §16?
>
> 2) Are those provisions of the Montana Wrongful Discharge from Employment Act which expressly prohibit recovery of noneconomic damages, and limit the recovery of punitive damages, violative of an individual's right to "full legal redress" within the meaning of Article II, §16?

The Court responded, "We answer 'No' to both questions." The majority then undertook a lengthy opinion to explain its answer.

In explaining its "no" to the first question, the Court stated, **"The Act does not violate the fundamental right of full legal redress, because no such 'fundamental right' is created by Article II, §16."** This holding reverses the interpretation the Court had established in cases from 1981, 1983, and 1986. In so doing, the majority examined "long-standing, fundamental principles of constitutional interpretation" and held that its reasoning in the previous cases had been "flawed." The Court also held that "no one has a vested interest in any rule of common law. Therefore, as a general rule, the legislature ... may alter common-law causes of actions."

Under this reasoning, while common law causes of action were previously available for discharged employees, the legislature has "the authority to expand or reduce claims and remedies at common law." In adopting the Wrongful Discharge of Employment Act, the legislature exercised this authority.

In answering the second question above, the Court said, **"The Act survives equal protection scrutiny because it is rationally related to a legitimate state interest."** This interpretation went beyond the scope of the question as certified and included "an analysis of the equal protection guarantee found in Article II, §4, of the Montana Constitution." The Court thus reframed the question:

> "Do the limitations on the recovery of certain damages in the Act violate equal protection because the Act unconstitutionally burden a class of claimants seeking damages for wrongful discharge?"

In order to discuss this question, the Court had to decide the "proper equal protection test" it should apply to the Act. Since it had already determined that no fundamental right of full legal redress exists, the Court said, "We determine that the proper level of scrutiny ... is provided by the rational basis test." (Note: The Court used the same test in upholding legislative immunity in the *Bieber* and *Peterson* cases above.) Using this test, the Court said, "We ... find that the Act's provisions on damages pass equal protection muster because the Act's disparate treatment of similar claims is rationally related to a legitimate state interest."

The Court agreed that unequal treatment of discharged employees could be a result of the Act, but a "legitimate state interest" could rationally justify that result. The Court interpreted the intent of the legislature in passing the Act to be "promoting the financial interests of businesses" in Montana. It was also the Court's opinion, based on precedent, that "to improve economic conditions in Montana constitutes a legitimate state goal." Further, the Court said, "[w]e also conclude that the Act relates rationally to promoting Montana's economic interests."
The Court broadly traced the development of the law regarding discharge:

> "Until recently, the fundamental body of law governing available damages in the employment area has been contract law. Courts ... have expanded employers' liability by recognizing tort claims in the employment context. The legislature has now acted to reverse this

trend by restricting damages for wrongful discharge."

The Court related this development (from contract law to tort claims back to contract law) to the legitimate state interest of limiting employers' liability in discharge cases:

> "The Act's limitation on damages applies long-standing contract law in an attempt to solve this problem [of employer liability] by dictating a more objective measure of damages. Under the Act, employers benefit because their potential liability is made more certain. Meanwhile, employees' control over the manner in which they are discharged remains, in part, as a result of the Act's 'good cause' requirement. The Act, in making this trade, is in no sense irrational."

The Supreme Court was closely divided in this decision. Justice Sheehy wrote a stinging dissent, in which Justice Hunt concurred. Sheehy's dissent, which labeled the majority decision as possibly "the blackest judicial day in the history of the state," disputed the majority opinion point by point. His conclusion ...

> "If Art. II, §16 of the Montana Constitution does anything, it imposes upon the judiciary the duty to guard the state constitution. In its decision today, this Court sidesteps that duty and reverses not only the cases mentioned in the majority opinion but a long line of cases in the pase 15 years that have established solid boundaries for employers and employees ... In yielding our duty to the vagaries of the legislature, we have disadvantaged a large portion of the Montana labor market in the guise of a better business climate. The Wrongful Discharge from Employment Act of 1987 is economically and socially regressive. The majority opinion is legally regressive. Because of the unwillingness of the majority to act properly in a constitutional case, regressiveness is the order of the day.
>
> "I would hold the Wrongful Discharge from Employment Act of 1987 to be invalid on the basis that under an equal protection test it cannot meet even a rational scrutiny. The only basis for the Act that I can find is that as between business and the workers, the legislature discriminatingly prefers business. That is not a constitutional basis on which to found a statute."

Justice Harrison dissented on narrower grounds. He objected to "reversing so many cases this Court has previously decided." In particular, he would uphold the previous case that held "when a cause of action is grounded on statute the plaintiff has a fundamental right to full legal redress under that statute."

Although this case was argued in conjunction with *Johnson v. State of Montana & Ed Argenbright*, the opinion did not address the Johnson case. However, that action presented an identical challenge to the Wrongful Discharge from Employment Act, and this decision would presumably dispose of it.

The full text of the Wrongful Discharge from Employment Act follows the index of cases below.

montana supreme court cases

Weir v. Ryan 68 Mont. 336 (1923)

State ex rel. Nagle v. Sullivan, et al. 98 Mont. 425, 40 P.2d 995 (1935)

State ex rel. Opheim v. Fish and Game Commission 133 Mont. 162, 323 P.2d 1116 (1958)

State ex rel. Ford v. Fish and Game Commission 148 Mont. 151, 418 P.2d 300 (1966)

Ameline v. Pack & Co. 157 Mont. 301, 485 P.2d 689 (1971)

Storch v. Board of Directors 169 Mont. 176, 545 P.2d 644 (1976)

Swanson v. St. John's Lutheran Hospital 182 Mont. 414, 597 P.2d 702 (1979)

Keneally v. Orgain 186 Mont. 1, 606 P.2d 127 (1980)

Reiter v. Yellowstone County 38 St. Rept. 686, 627 P.2d 845 (1981)

Gates v. Life of Montana Insurance Co. 196 Mont. 178, 638 P.2d 1063 (1982) *often called "Gates I"*

Nye v. Department of Livestock 196 Mont. 222, 639 P.2d 498 (1982)

Leland v. Heywood 197 Mont. 491, 643 P.2d 578 (1982)

Lovell v. Wolf 197 Mont. 443, 643 P.2d 569 (1982)

Como v. Rhines 198 Mont. 279, 645 P.2d 948 (1982)

Small v. McRae 200 Mont. 497, 651 P.2d 982 (1982)

Gates v. Life of Montana Insurance Co. 205 Mont. 304, 668 P.2d 213 (1983) *often called "Gates II"*

Owens v. Parker Drilling Co. 41 St. Rept. 66, 676 P.2d 162 (1984)

Bridger Education Association v. Board of Trustees 41 St. Rept. 533, 678 P.2d 659 (1984)

Dare v. Montana Petroleum Marketing Company 41 St. Rept. 1735, 687 P.2d 1015 (1984)

European Health Spa v. Montana Human Rights Commission 41 St. Rept. 1766, 687 P.2d 1029 (1984)

Welsh v. City of Great Falls 41 St. Rept 1826, 690 P.2d 406 (1984)

Crenshaw v. Bozeman Deaconess Hospital 41 St. Rept. 2251, 693 P.2d 487 (1984)

Conboy v. State of Montana and Harrison 42 St. Rept. 120, 693 P.2d 547 (1985)

Pryor School District v. Superintendent of Public Instruction, et al. 42 St.Rept. 1405, 707 P.2d 1094 (1985)

Flanigan v. Prudential Savings and Loan Association and Fred Ogolin 43 St.Rept. 941, 720 P.2d 257 (1986)

Dawson v. Lee Enterprises and the Billings Gazette 43 St.Rept. 1476, 723 P.2d 238 (1986)

Mead v. McKittrick, et al. 43 St.Rept. 1886, 727 P.2d 517 (1986)

Miller v. Catholic Diocese of Great Falls 43 St.Rept. 2059, 728 P.2d 794 (1986)

Brinkman v. State of Montana 43 St.Rept. 2163, 729 P.2d 1301 (1986)

Smith v. Montana Power Company 44 St.Rept. 124, 731 P.2d 924 (1987)

Drinkwalter v. Shipton Supply Co. 44 St.Rept. 318, 732 P.2d 1335 (1987)

Kerr v. Gibson's Products Co. 44 St.Rept. 462, 733 P.2d 1292 (1987)

McClain, et al. v. NERCO, Inc., and Spring Creek Coal Co. 44 St.Rept. 1094, 738 P.2d 1285 (1987)

Nordlund v. School District No 14, and High School District No. A, Phillips County, Montana 44 St.Rept. 1183 , 738 P.2d 1299 (1987)

Anderson and Anderson v. TW Services, Canteen Corporation, TWA Services, Inc., a/k/a TW Service, Inc., Ritchie, Miles and Woolsey 44 St.Rept. 1293, 741 P.2d 397 (1987)

Barnes v. Koepke and Big Springs and Glacier County 44 St.Rept. 810, 736 P.2d 132 (1987)

Belcher v. Department of State Lands 44 St.Rept. 1591, 742 P.2d 475 (1987)

Malloy and Malloy v. Judge's Foster Home Program, Inc. and Vaughan 44 St.Rept. 1996, 746 P.2d 1073 (1987)

Riley v. Warm Springs State Hospital, Department of Institutions, State of Montana, and the Independent Union of Warm Springs State Hospital 44 St.Rept. 2183, 748 P.2d 455 (1987)

Stark v. The Circle K Corporation 45 St.Rept. 371, 751 P.2d162 (1988)

Nasi v. State Department of Highways 45 St.Rept. 710, 753 P.2d 327 (1988)

Myers v. Department of Agriculture 45 St.Rept. 1056, 756 P.2d 1144 (1988)

Janz v. Quenzer, d/b/a Ben Franklin Store. 45 St.Rept. 1178, 756 P.2d 1174 (1988)

Bieber v. Broadwater County and Duede 45 St.Rept. 1218, 759 P.2d 145 (1988)

Frigon v. Morrison-Maierle, Inc., Enright, and Larsen 45 St.Rept. 1344, 760 P.2d 57 (1988)

Rupnow v. City of Polson 45 St.Rept. 1734, 761 P.2d 802 (1988)

Barrett v. ASARCO Incorporated 45 St.Rept.1865, 763 P.2d 27 (1988)

Bestwina v. Village Bank and Richard Olson 46 St.Rept. 27, 767 P.2d 338 (1989)

Mahan v. Farmers Union Central Exchange 46 St.Rept. 96, 768 P.2d 850 (1989)

Prout v. Sears, Roebuck, and Co. 46 St.Rept. 257, 772 P.2d 288 (1989)

Niles v. Big Sky Eyewear, a/k/a Professional Eyecare, Leonard Vainio, and David Vainio 46St.Rept. 504, 771 P.2d 114 (1989)

Hobbs v. Pacific Hide and Fur Depot 46 St.Rept. 544, 771 P.2d 125 (1989)

Gentry, Damon, and Gleich v. City of Helena and Police Commission of the City of Helena 46 St.Rept. 862, ___ P.2d ___ (1989)

Peterson v. Great Falls School District 1 and A 46 St.Rept. 880, ___ P.2d ___ (1989)

Keller v. School District No. 5 and its Board of Trustees, and Ed Argenbright 46 St.Rept. 986, ___ P.2d ___ (1989)

Thompson v. Board of Trustees of School District No. 2, Yellowstone County 46 St.Rept. 1000, ___ P.2d ___ (1989)

Meech v. Hillhaven West, Inc., and Semingson (Case No. 88-410) 46 St.Rept. __, ___ P.2d ___ (1989)

federal district court cases

Weber v. Highway Commission of State of Montana 333 F. Supp. 561 (1971)

Staudohar v. Anaconda Company 527 F. Supp. 876 (1981)

Oedewaldt v. J. C. Penney Company 45 St.Rept. 1366, ___ P.2d ___ (1988)

the wrongful discharge from employment act

39-2-901. Short title. This part may be cited as the "Wrongful Discharge from Employment Act".

39-2-902. Purpose. This part sets forth certain rights and remedies with respect to wrongful discharge. Except as limited in this part, employment having no specified term may be terminated at the will of either the employer or the employee on notice to the other for any reason considered sufficient by the terminating party. Except as provided in 39-2-912, this part provides the exclusive remedy for a wrongful discharge from employment.

39-2-903. Definitions. In this part, the following definitions apply:

(1) "Constructive discharge" means the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative. Constructive discharge does not mean voluntary termination because of an employer's refusal to promote the employee or improve wages, responsibilities, or other terms and conditions of employment.

(2) "Discharge" includes a constructive discharge as defined in subsection (1) and any other termination of employment, including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason.

(3) "Employee" means a person who works for another for hire. The term does not include a person who is an independent contractor.

(4) "Fringe benefits" means the value of any employer-paid vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, and pension benefit plan in force on the date of the termination.

(5) "Good cause" means reasonable, job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason.

(6) "Lost wages" means the gross amount of wages that would have been reported to the internal revenue service as gross income on Form W-2 and includes additional compensation deferred at the option of the employee.

(7) "Public policy" means a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule.

39-2-904. Elements of wrongful discharge. A discharge is wrongful only if:

(1) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;

(2) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or

(3) the employer violated the express provisions of its own written personnel policy.

39-2-905. Remedies. (1) If an employer has committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge, together with interest thereon. Interim earnings, including amounts the employee could have earned with reasonable diligence, must be deducted from the amount awarded for lost wages.

(2) The employee may recover punitive damages otherwise allowed by law if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the employee in violation of 39-9-904(1).

(3) There is no right under any legal theory to damages for wrongful discharge under this part for pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages except as provided for in subsections (1) and (2). [see 27-1-221, MCA, regarding "actual fraud" and "actual malice"]

39-2-906 through 39-2-910 reserved.

39-2-911. Limitation of actions. An action under this part must be filed within 1 year after the date of discharge.

(2) If an employer maintains written internal procedures, other than those specified in 39-2-912, under which an employee may appeal a discharge within the organizational structure of the employer, the employee shall first exhaust those procedures prior to filing an action under this part. The employee's failure to initiate or exhaust available internal procedures is a defense to an action brought under this part. If the employer's internal procedures are not completed within 90 days from the date the employee initiates the internal procedures, the

employee may file an action under this part and for purposes of this subsection the employer's internal procedures are considered exhausted. The limitation period in subsection (1) is tolled until the procedures are exhausted. In no case may the provisions of the employer's internal procedures extend the limitation period in subsection (1) more than 120 days.

(3) If the employer maintains written internal procedures under which an employee may appeal a discharge within the organizational structure of the employer, the employer shall within 7 days of the date of the discharge notify the discharged employee of the existence of such procedures and shall supply the discharge employee with a copy of them. If the employer fails to comply with this subsection, the discharged employee need not comply with subsection (2).

39-2-912. Exemptions. This part does not apply to a discharge:

(1) that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. Such statutes include those that prohibit discharge for filing complaints, charges, or claims with administrative bodies or that prohibit unlawful discrimination based on race, national origin, sex, age, handicap, creed, religion, political belief, color, marital status, or any other similar grounds.

(2) of any employee covered by a written collective bargaining agreement or written contract of employment for a specific term.

39-2-913. Preemption of common-law remedies. Except as provided in this part, no claim for discharge may arise from tort or express or implied contract.

39-2-914. Arbitration. (1) Under a written agreement of the parties, a dispute that otherwise could be adjudicated under this part may be resolved by final and binding arbitration as provided in this section.

(2) An offer to arbitrate must be in writing and contain the following provisions:

(a) a neutral arbitrator must be selected by mutual agreement or, in the absence of agreement, as provided in 27-5-211.

(b) The arbitration must be governed by the Uniform Arbitration Act, Title 37, chapter 5. If there is a conflict between the Uniform Arbitration Act and this part, this part shall apply.

(c) The arbitrator is bound by this part.

(3) If a complaint is filed under this part, the offer to arbitrate must be made within 60 days after service of the complaint and must be accepted in writing within 30 days after the date the offer is made.

(4) A party who makes a valid offer to arbitrate that is not accepted by the other party and who prevails in an action under this part is entitled as an element of costs to reasonable attorney fees subsequent to the date of the offer.

(5) A discharged employee who makes a valid offer to arbitrate that is accepted by the employer and who prevails in such arbitration is entitled to have the arbitrator's fee and all costs of arbitration paid by the employer.

(6) If a valid offer to arbitrate is made and accepted, arbitration is the exclusive remedy for the wrongful discharge dispute and there is no right to bring or continue a lawsuit under [sections 1 through 8]. The arbitrator's award is final and binding, subject to review of the arbitrator's decision under the provisions of the Uniform Arbitration Act.

From the legislative reference bill:

Section 10. Repealer. *Sections 39-2-504 and 39-2-505, MCA, are repealed.*

Section 11. Severability. *If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid application.*

Section 12. Applicability. *This act applies to claims arising after the effective date of this act.*

Section 13. Effective date. *This act is effective July 1, 1987.*